77-1063

IN THE

SUPREME COURT OF THE UNITED STATES

TERM, 1978

No. A-491

SYDNEY M. EISENBERG,

Petitioner,

— vs —

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

SYDNEY M. EISENBERG,
Petitioner

POST OFFICE ADDRESS:
1131 West State Street
Milwaukee, Wisconsin 53233
Telephone No. 271-0931

FINEST LEGAL BRIEFS CO., MILWAUKEE, WISCONSIN 53203

INDEX

AUTHORITIES CITED FOR REVIEW

Cases

Other Authorities

IN THE

SUPREME COURT OF THE UNITED STATES

TERM, 1978

No. A-491

SYDNEY M. EISENBERG,

Petitioner,

— vs —

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

ISSUES PRESENTED

1. Whether Count I should have been dismissed, on motion, as being beyond the Statute of Limitations.
2. Whether the indictment should have been dismissed for selective and discriminatory prosecution.
3. Whether the evidence was sufficient to support the findings and judgment of the Court.
4. Whether the Court used an erroneous standard of proof.
5. Whether the Court erred in finding the Motior for New Trial untimely and the grounds therefore merely cumulative.

6. Whether the Court erred in denying the motions of Defendant.

7. Whether the rights of Defendant under the 5th Amendment were violated.

8. Whether the rights of Defendants under the 14th Amendment were violated.

9. Whether a trial judge can conclude that the proof on each count standing alone would not justify a conviction, but by adding them together, a conviction would be supported by the evidence.

10. Can IRS introduce testimony immaterial to criminal issues with the consent of a trial court and then claim circumstantial evidence without any proof of criminal intent whatsoever.

STATEMENT OF CASE

Only the U.S. Supreme Court can undo the horrible wrong which was created by the IRS at the instance of an unknown but obvious power. The unknown influence's name is missing from the IRS Intelligence file in this case as was everything else missing from the file except a pile of newspaper clippings concerning the many activities of Defendant. There was obviously a directing force bent on destroying the credibility of Sydney M. Eisenberg so that the public would not believe him when he speaks the truth. It is just that simple. Here is the "frameup" that followed at the hands of the U. S. and IRS.

The IRS, at the instance of someone, obviously, deliberately and effectively, helped to fulfill a plot and scenario which turned into a nightmare the life of a decent, hard-working lawyer who never took a course

in high school, college or elsewhere in bookkeeping, all his records that were received were turned over to his trained bookkeeper's NCR computer operations and CPA's, doing nothing whatsoever in bookkeeping himself, while signing piles of checks when talking on the telephone or interviewing clients. He practiced law since 1939, was of Jewish faith, was born and raised in the City of Milwaukee, attained a teaching degree in secondary education at the Milwaukee State Teachers College, graduated with a degree in Doctor of Laws at Marquette University, and thereafter commenced the practice of trial work in Milwaukee, that was to win him international recognition. His present massive coronary heart attack resulted in his his present hospitalization treatment for same at Mt. Sinai Medical Center in Milwaukee in the special care unit. He previously had a stroke, diabetes and other problems. But the treatment of him hereinafter related is inexcusable by IRS and the Courts.

Defendant, in 1968, 1969 and 1970, was a member of a law firm including a number of lawyers, who were practicing law. Defendant also was the owner of 5 or 6 "high rises" and other properties, some of which were individually owned, and some in solely owned corporations. Defendant was involved in cases in various parts of the United States, labor counsel for numerous unions, Honorary Consul to a foreign country; he was involved in the operation management and repairs of over five hundred apartments and an art and craft center as part of the realty ownership.

Defendant was publicly, through the Milwaukee Sentinel acknowledged as being involved in the largest plaintiff's trial practice in the State of Wisconsin, often

being escorted by bailiffs from court to court, frequently commencing new trials without any rest.

Defendant retained, on behalf of all his income tax and bookkeeping activities, no less than five to ten bookkeepers and two certified public accountant firms, in which he had complete confidence, and signed voluminous income tax returns prepared by the two certified public accountant firms. Defendant had a right to and did rely completely upon the skill and integrity of the two certified public accountants who prepared the returns in question. All records were available at all times for everyone to see.

Defendant further asserts that none of Defendant's funds, at any time, were merged with clients' funds, nor were clients involved in any way, shape, for or manner in the tax problem which are the subject of this disciplinary action.

Defendant asserts, further, that he was required to stay away from the law office during various periods of the thirty-six months involved, and that it would have in any event, been physically impossible for him to audit the records which he had every right to believe the bookkeepers were recording and the certified public accountants were preparing for tax returns.

Defendant asserts that the IRS admittedly selected Defendant as a target in 1968, following a tremendous amount of publicity which resulted from Defendant's law firm defending one Ora Tucker, who was accused of murder involving police officers and the riots which took place in Milwaukee.

The Court of Appeals callously ignored the missing documents in the IRS criminal intelligence file. The reason for the prosecution, Defense Counsel saw no case whatsoever and decided not to even try to put in any proof. Defendant is absolutely innocent and stands to lose everything. His law license has been suspended, his reputation shattered.

Agent Terrence Kelly told Eisenberg he could be held liable the same way the President of General Motors was liable for possible mistakes by his bookkeeper. Mr. Kelly was taking business courses part time in the old Milwaukee Vocational School now known as MATC for his bookkeeping background.

Defendant further asserts that immediately following the culmination of the Tucker case, a black man who was accused of murder with huge headlines in the Journal and Sentinel, and the acquittal of Tucker in the murder portions of the case in 1968, a course of harassment threatening the life of Defendant followed, as well as attacks upon Defendant. The Defendant then became involved in a disciplinary proceeding during the years involved which consumed years of attention and caused great aggravation.

Defendant further asserts that it was virtually impossible for him, under the circumstances, to get involved in bookkeeping practices.

Defendant further asserts that he was indicted for signing a false return, although the IRS had spent over twenty years in constant checking to determine whether Defendant had, in fact, evaded any income taxes. IRS obviously found not any tax evasion and so decided to proceed on a false return basis.

Defendant asserts further, that such indictment by the IRS came only when the IRS concluded that there

was, in fact, no income tax evasion that they could ever find, in spite of the many thousands of hours and years they spent checking, during which time Defendant had provided an office and space for the IRS to check the records, with complete access to all the many thousands of transactions and records in which Defendant was involved. Not one record was cancealed or altered. Mr. Kelly was treated as a guest when at the Eisenberg office; his own telephone, coffee, access to all conversations and records.

Defendant further asserts that the original government indictment was originally dismissed on its own motion by the United States Attorney, for the reason that it was obvious there are no gross understatements. Defendant never kept a penny. He never opened any mail or took in any fees. The IRS subsequently again indicted because of the wasted thousands of investigation hours, now claiming false returns in the following areas:

1. That there had been an overlapping of checks paid for expenses, although Defendant was given to understand by his bookkeepers and accountants that expenses were to be charged to the years incurred. rather than when the checks were actually delivered, and that said system had been in operation for years. Defendant understanding that there could be no loss to the IRS because "roll-overs" would even out the situation. There was no loss to IRS.

2. That checks issued to an attorney for payment of his bill did not correspond to invoices for the reason that periodic payments were made by the bookkeeper who had complete control of the account and she sent checks when money was available; the

bills and payments at all times were available for audit. Checks had been held up when seller and Murphy decided the debt should be litigating.

3. That several stock transactions, perfectly visible to everybody and documented in monthly broker statements available to bookkeepers, accountants and everyone else were claimed by IRS to have been overlooked, notwithstanding the fact that only a couple of transactions out of millions of dollars handled in the period involved, and Defendant understood the sales involved came from the cashing in of corporate bonds and nothing is due IRS anyway. Written minutes were found by IRS proving taxpayer was wholly correct in the manner of bond and stock sales in the records of former CPA firms.

4. Defendant further alleges that he is not a bookkeeper, had no bookkeeping experience, and made every attempt possible to have the books and records kept by the bookkeepers open to IRS and the certified public accountants.

5. Defendant further alleges that the law firm representing him in the tax case refused to permit an independent auditing firm which he had engaged to audit all the records involved to testify, although members of the auditing firm sat ready to testify throughout the trial; that the case was tried without a jury, and the Defendant's counsel, apparently believing that there was not possibly any case against Defendant, refused to permit him to testify; that the Court found Defendant guilty and fined him $3,000.00 on each of two counts and $1,000.00 on another count; that the Court in no way made any statement whatsoever impugning the morals or

character of the Defendant, but, instead, concluded that the Defendant should have been aware of the accounting procedures when he signed the tax returns involved, although not one witness ever testified he was instructed to falsify anything.

6. Defendant further asserts that he was totally unaware of accounting procedures, all the necessary records were provided by creditors and debtors through his bookkeepers who kept the records, so that the acccuntants did not prepare any false returns and that the Defendant possibly could have been aware of any false balances whatsoever.

7. Defendant further alleges that the two certified public accountants who prepared the tax returns admitted they were retained by Defendant to check on each other and make sure the returns were correct. One CPA admitted it was his duty to check every single record involving Defendant. There was simply not another precaution Defendant could take.

ARGUMENT

Defendant's office was a defender of a black man accused of murder in the middle of the black riots and Defendant had repeatedly objected to a monopoly by the press. He was a perfect candidate for the IRS prosecution on a selective basis. He was forthright and expected his help and the government to be so.

While the IRS accountant was auditing Defendant, using his office and the CPA's office virtually as the IRS own accountant's office, said Kelly conferred with IRS Intelligence, who had the IRS accountant Terrance Kelly continue his audit, all without warning to Defendant, who kept asking, without success, what was it all

about. Of course, all the interrogation was about, was to crucify the Defendant. The Milwaukee Journal had quite a bone to pick with the Eisenbergs. Traffic Judge Krueger was a mean irrasible judge who was still unusually generous to certain persons only.

In the Friday, September 19, 1969, Milwaukee Sentinel, Mayor Maier of Milwaukee is quoted as follows:

"Mayor Maier had some pungent remarks about the Milwaukee Sentinel Thursday.

"During a meeting of the city's budget examining committee, the mayor called the paper ' a dirty little bastard' and referred to its editor, Harvey W. Schwandner, as 'Herr Goebbels Schwandner.'

"Paul Joseph Goebbels was propaganda minister of Nazi Germany.

"The mayor also told the Sentinel reporter covering the meeting to make sure he spelled bastard with a capital B.....

"The mayor made a remark about The Journal Company and then commented: 'When they want propaganda, they go to Herr Goebbels Schwandner.'

"Maier then remarked that The Milwaukee Journal, the afternoon paper published by The Journal Company, was perhaps too dignified to write propaganda. 'They've got that dirty little bastard in the morning now,' he said referring to The Sentinel . . . ."

Mr. Tucker was a black man, who had become a janitor of Shorewood High School, had fought in World War II, and the Tucker murder case was a weird one. Mr. Tucker was standing at the side of the street during a curfew imposed by the Mayor because of riots in Milwaukee. An individual drove up in a white car,

shot a woman standing next to Mr. Tucker on the street, which had people lined up on the side of the street where all traffic was barred; he threatened to kill every black (unmentionable) on the block, and thereafter an unmarked squad car with police officers not in uniform drove down said street and started shooting at Tucker, who shot back. The Tucker home was burned to the ground by the police, and a woman in the house, a Mrs. Moses, was burned to death. Tucker was blamed for all the riots by the Milwaukee Journal and was tried at a bitter jury trial. The Eisenberg law office was shot up with bullets, after appealing unsuccessfully to the U. S. Supreme Court for a change of venue. Tucker was cleared by the jury of the 1st degree murder charge but found guilty of a lesser charge after a lengthy heavily publicized trial.

Followers of the Nazi Bund organization, which had been conceived and operated in the Milwaukee area, waiting for Hitler to take over America, but even now parading on Milwaukee downtown streets, together with members of the Klu Klux Klan, started a course of harassment towards the Eisenbergs for defending Mr. Tucker. Then ensued threats, shooting into the office, breaking windows and other vilifications followed. The Tucker trial was concluded in July, 1968.

An unsurpassed newspaper, TV and radio campaign of villification was continued repeatedly and constantly to depict defendant as a lawyer with a tremendous practice, clogging the Courts, defending black people accused of riots and murders, defending worthless little people against the powerful and righteous ones. Apotential jury hearing tax charges which it probably didn't even understand, would have been poisoned in

advance by the Journal attack. Lawyers who respected the Eisenberg's courage, decency and honesty could could be ostracized by the mass media controlling public sentiment in a moment and everyone was well aware of the danger. In a strong ethnic majority community, defendant was still a Jew. The time frame following World War II within the memory of most Wisconsinites.

Defendant's law office had to retain armed guards all over the premises during the years involved. The office was robbed, safe broke open and records removed by burglars who did not appear to be seeking money. This is all the more reason why the court should have held a hearing on selective prosecution or dismiss the case altogether.

In the same year, 1968, a Milwaukee County Traffic Judge, who was mentally disturbed, was operating his court in an insane manner, demonstrating bigotry from the bench, riding his bicycle in the courtroom, and placing a huge fish bowl on the bar in front of him, sending pregnant women to jail for "J-walking". He performed many other insane acts when he had before him both lawyers and individuals who practiced minority religious faiths. He came with a friend, an attorney, his campaign manager, to the home of Defendant and pleaded with Defendant to make peace with Defendant's son, a practicing attorney who was seeking to remove the judge from office by statutory means of recall. Said judge stated he was ashamed of his conduct and intended to correct his actions so that Defendant and others would be proud of him. The campaign manager and friend was later discovered to have drug bonds reduced by his friend the judge.

But he asked for peace between the judge and Defendant's son, saying to the well meaning Defendant that the judge had tried to kill himself by jumping out to his car. The said traffic judge and his lawyer agreed it would be best to create a committee to act as omnibudsman, asking for Defendant, his son and wife to serve on the committee together with said judge's friend, the lawyer, and which committee Defendant believed would have as many as 30 or 40 people on it, all unpaid to serve for the good of the community. The local aforementioned newspaper had a reporter call the judge, take the judge down to the newspaper office where he was struck by an editor and forced into tears, after reporting the Eisenberg-Krueger, Cameron peace effort.

The very next morning, the judge received a phone call from a Journal newspaper reporter who lied and reported that the judge was reported by the District Attorney that he was going to be removed as a judge. The judge went into the next room beside his chambers, removed a gun from the holster of the deputy sheriff assigned to his court and shot himself. Thereafter, the said newspaper commenced an attack on Defendant and his son, reporting supposedly a dead man's remark. Defendant suggesting the judge had told the newspaper editor that Defendant's son had been watching the judge through a keyhole, even though a later inspection proved the door referred to had no keyhole.

If these charges are weird so far, there is only more to follow which is just as ridiculous or more so.

Finding a "Patsy"

The newspaper described at the Milwaukee Journal and Sentinel caused a John Doe investigation to be held

secretively undoubtedly so that its actions could not be revealed, and then, since the chairman of the State Board of Bar Commissioners was also the attorney for the Daily Newspaper League of Wisconsin Newspapers, of which the largest newspaper was the said daily Milwaukee newspaper, its editorializing demanded that an investigation of the Eisenbergs on the cause of the said judge's death be not referred to the local Bar Association, but to the State Board of Bar Commissioners.

Said State Board took testimony of which Defendant generally didn't at that time know what they were talking about so he spent almost all of his time talking about his son's having 4 surgeons in 3 days to find a bleeding artery only by a miracle. But many lawyers, knew the obvious about the situation because the said Board requested that the Supreme Court appoint a referee to hear a complaint against Defendant and his son to the effect that they had somehow been "involved in the events leading to the death of the judge" and therefore were disrespectful. The newspapers involved, namely the Journal and Sentinel printed huge headlines suggesting the forthcoming hearing more or less a criminal charge of some type. The chairman of the Board of Bar Commissioners was in fact, appointed by the Wisconsin Supreme Court. The referee was a former Dean of Wisconsin Law School, and after a long thorough heading involving the testimony of many witnesses, completely exonerated this Defendant and his son in a detailed report.

The Defendant was very well known in Milwaukee as a trial attorney. In the same year, 1968, the only daily newspaper in Milwaukee was the Milwaukee

Journal, an afternoon paper, which also owned and published the Milwaukee Sentinel, the only morning newspaper, as well as WTMJ TV, WTMJ and WTMJ FM, the largest TV and radio stations.

Defendant also had conceived a concept for a modern newspaper which could be introduced in the Milwaukee area starting with a huge reading public as a "give-away" newspaper. But it was only on the drawing board. Defendant, meanwhile established as a union lawyer, commenced organizing an independent union many Milwaukee Journal workers to get them decent pay. To discredit the Defendant's credibility would be extremely helpful to the Milwaukee Journal at this point to say the least. Married Journal truck drivers complained they could not live on as little as $1.50 to $2.00 per hour. Other drivers received much more.

The Milwaukee community was divided in nationality, with the largest segment of the population of German heritage and the second largest, Polish. The Journal and Sentinel sold many newspapers and invited a tremendous amount of attention when the Jewish Eisenbergs received their comeuppance. Defendant was suspended for a year by the Wisconsin Supreme Court when the Wisconsin Supreme Court disregarded the referee's decision. The Wisconsin Supreme Court disregarded the referee's conclusions, suspending the Defendant for a period of 12 months until reinstatement. The reinstatement was lengthened by the Wisconsin Bar Association to a strange 21 months. Upon reinstatement, the Wisconsin Supreme Court ordered the costs of the reinstatement to be assessed against the Wisconsin Bar Association. Besides

the 12-month suspension, the two Eisenbergs were fined $20,000.00, the largest fine in the history of the State of Wisconsin or maybe the entire U.S. as to any attorney. All for committing no crime, receiving no favors; simply striving for decent courts and to help a sick judge try to change for the better and live.

The unknown power caused the IRS in the same year, 1968, to commence a criminal intelligence investigation against the Defendant. The Defendant not only had to face the situation with respect to his Bar problems, newspaper attacks in connection with said Bar problems, the aforementioned Klu Klux Klan attacks and the brunt of Nazi attacks and threats. The IRS also quickly moved in. An IRS accountant named Kelley had been for several years checking and apparently approving the bookkeeping of the Eisenberg office. IRS Intelligence then deliberately called him in and told him to check 1967, 1968 and following years for the basis of a criminal investigation.

Clients and business acquaintances were visited and told the IRS was making a criminal investigation against the Eisenbergs. The harrassment was vicious. Whenever a bar hearing came up, IRS called for an immediate conference with Eisenberg. Defendant was unable to spend any time whatsoever with reference to even observing the theory of machine or other keeping of books and records. He had signed checks without question with either left or right ambidexterous hand while with a client or on the telephone when checks were presented to him "en masse." There is no testimony whatsoever that he ever drew up, spent anytime checking, estimated or placed the amount in, of even one check; why should he? CPAs were hired

to catch major mistakes. With a whole family there, why should anyone steal? Out of 70 to 100 employees there were bookkeepers with adding machines and computers he didn't even know the slightest about how to operate. He couldn't make out one check. The lower court and the Court of Appeals missed the point completely. He never knew what was owed. There was no account payable as such because there was no way he could tell any balance due. There was no one who testified he ever saw a bookkeeper during the years involved for the law office. Bookkeeper Ethel Bolden as the law office bookkeeper did only occasional work at the law office till she left. She had formerly been in full charge of the law office records and no one ever contradicted her because of her experience. Defendant was busy with the following:

Activities of Sydney M. Eisenberg in 1968, 1969 and 1970.

1. Newspaper conception and financing attempts in Milwaukee and New York.
2. Tucker murder case trial and preparation; Tucker accused of murder.
3. Judge Krueger and John Doe investigations on cause of core area riots during riot curfew in Milwaukee.
4. Bar Commissioner, disciplinary charges, preparation and hearings removing for periods from the office as dicipline required. Attorney son, Neil, Attorney Daughter-in-Law Phyllis Eisenberg, wife Attorney Miriam were practicing law in his office. Defendant wanted to sit in as a bookkeeper, was told to leave by virtue of the Supreme Court order.

5. Jury trials and preparation for hearings outside of Wisconsin.
6. Conferences in Europe on cases — Italy, France, England. Foreign financing attempts for projects.
7. Union clients' legal problems and cases, for unions such as:

   Retail Clerks Union
   AFL-CIO and Building Service Employees Union
   Paper Mill Workers Union
   CUA
   Die Sinkers Union
   School Bus Employees Union
   MAC Independent Union

8. Court trial work, preparation, briefing, and actual trials and appeals in Civil and Criminal cases.
9. Settling cases.
10. Taking care of tenants' complaints, maintenance, repairs and rentals (approximately 500 units).
11. Plans for remodeling, research, and rentals for Sydney HiH-Arts and Crafts Center.
12. Threats to lives and shooting up of office — KKK and Nazi aftermath from Tucker case victory.
13. Judge Krueger's death investigation to find who really caused his death, and the involvement of the newspapers.
14. Dominican Consul, assistance to Nationals, without pay.
15. Preparation on Supreme Court and other appeals on cases for clients; checking and arguing same.

16. Building inspector problems on buildings, their resolution and analysis.
17. Conferences and planning for cases in process when practicing law.
18. Obtaining financing to pay current bills as urgency appears.
19. Buying and selling stocks and daily checking with brokers for stock quotations and tape news for 700 issues or more.
20. TV and radio appearances.
21. Reading law cases, magazines, newspapers, and periodicals generally.
22. Personal illness and use of tranquillizers and other medication.
23. Interviewing new clients, when allowed to practice.
24. Conferences on business propositions presented by brokers.
25. Keeping peace, labor relations and disputes between 70 to 100 employees, as well as between disputing sons, Alan and Neil.
26. Weddings, bar mitzvahs, birthdays and deaths.
27. Attempts to get some rest somehow.
28. He never did any, bookkeeping whatsoever at anytime in his life.

The Facts Are Clear and Overwhelming in Favor of Defendant

At all times, even when in the office building which contained thirty offices, Defendant's office had a second

entrance in his little office on the first floor in the back of the building. Defendant could enter and leave his own office without interfering in any way with any bookkeeper on his floor or even go to the second floor except on rare occasions.

Defendant believed that the two accounting firms he engaged were reliable, honest and forthright. The Nankin CPA firm was in charge of preparing income tax returns with reference to several buildings which the Defendant owned. Nankin had handled fraud work for IRS. The Levine CPA firm was engaged to handle the accounting of all records, including tax preparations, for anything involving Defendant personally. Defendant's employees numbered 70 to 110 through the years involved. There is no way under the sun that he could have prepared the income tax returns involved and he did, in fact, nothing to prepare them.

In the course of the IRS's prior investigations and the sudden change to criminal investigation after the Intelligence was ordered to conduct a criminal investigation by an unknown superior, the criminal investigation file suddenly was stripped by one or more unknown persons with only the many newspaper clippings left. Mr. Howe, who was in charge of the criminal investigation, stated he had no knowledge of what had happened to any records inside the file and with a result that the file contained a huge mass of newspaper clippings. Whether or not the daily newspaper sent the newspaper clippings over to IRS and had enough "clout" to direct and push in a course which would lead to the destruction of Defendant by the United States government itself, is certainly worth considering. How could a file be put together without notes, memoranda, history, commentaries, instructions,

rework of conferences, notes as to authenticity, what to look for, who placed it there, made up the file, ordered the criminal investigation, told what to look for, suggest some IRS significance out of all of this and started the wheels turning. There is no question about the facts here.

The file, itself, did not show who caused the investigation or why Mr. Howe, as head of the Intelligence Unit, would have conferred with Mr. Terry Kelly of the accounting IRS section and informed him of the criminal investigation. At any rate, a word to the wise was sufficient. Here was a criminal investigation ordered by the government itself. It would therefore be a simple matter to develop a criminal case with all the power of the U.S.A. behind it. Certainly the powerful Milwaukee Journal would be happy. Mr. Terry Kelly, in order to win the admiration of his superiors after many thousands of hours of time wasting tax evasion investigation, had only now to find some evidence of mistake. The investigations had proven Defendant to be absolutely honest. Any attempt at income tax evasion had to fail because every penny of income was evident in the books. Defendant had secreted nothing whatsoever. The matter was strictly a civil accounting problem. So Mr. Kelly, in conjunction with IRS Intelligence Chief, Mr. Howe, who supposedly let Mr. Kelly continue with his friendly investigation while in periodic conferences with IRS Intelligence, proceeded on the "hatchet job." Sydney Eisenberg must be found guilty of something. Three felonies sounded "great" even if for a disputed lawyers bill.

First of all, it became evident that there had been some bookkeeping errors which were corrected by the

CPA through an amended return within a matter of months after filing, although a CPA had drawn the return. The IRS took the strange position that obviously the return was false or it would not have been amended. This, incidentally, could be said about anyone's amended return, since any large return has to contain errors in the mind of the beholders or errors made in addition. In the instant case, errors, apparently occurred wherein obvious tax deductions for many thousands of dollars with respect to mortgage payments and real estate taxes were not deducted to the benefit of the taxpayer. On the other hand, there were apparently some bookkeeping errors of omission which balanced each other out. So the IRS took a vicious approach which was without justification.

If Nothing Else Attack the System

The bookkeeping system itself then apparently had to be attacked. It meant nothing that the bookeeping system had been in effect for over 35 years. The system involved a hybrid approach. It was customary, at the direction of CPA Accountant Levine, who testified to same, that he had ordered the bookkeepers to issue checks for all bills due within the calendar period. If there was not enough money to cover the checks, the checks were issued the following year at such period during the months that money became available. The creditors had issued bills for said amounts. The IRS disagreed with the system, although admitting at least that many of all small businessmen used it and notwithstanding the fact that "roll-overs" would have meant that there was no tax due anyway, since any tax due one year, would be wiped out by the tax credit of the following year, and since the system had been in effect for so many years.

There would have been no difference under any circumstances. CPA Levine said that many of his clients including Defendant were told to use the same system and that 35% of all small business people taxpayers use the same hybrid type system.

The IRS then set a consultation in Washington at which time Defendant retained a former Assistant U.S. District Attorney to represent him, namely, Attorney Stanley Gimbel. Mr. Gimbel reported the Chicago conference had been eliminated. He had only a Washington conference to meet with a government conferee. He went to Washington, D.C., and returned from a meeting with the sole Conferee William Hyatt, Criminal Attorney, Tax Division, Department of Justice, in Washington. He reported that Mr. William Hyatt had told him that he was recommending dismissal of this case because the file had been "papered" and certainly there could not be any type of criminal case. Defendant was told to sleep soundly. A month or two later, when Defendant had not received written word of such dismissal, he asked Mr. Gimbel to call Mr. Hyatt and was then told that another unnamed individual had to be consulted that it was now "one-on-one." Approximately a month later, Mr. Gimbel reported that Mr. Hyatt had told him it was now "two-on-two" against the Defendant and criminal prosecution would be sought, with no reason nor names given.

The Indictment Farce

Indictments on three charges were obtained from a Grand Jury in Milwaukee at the request of U.S. Assistant District Attorney David Bukey. Mr. Bukey subpenaed the two CPA's who had prepared the Eisenberg income tax returns and a bookkeeper named

Mable Peterson as government witnesses. Mr. Bukey's conduct became reprehensible. Mr. Bukey accused Mabel Peterson of having a tape recorder in her purse conduct became insolent and reprehensible. Mr. Bukey accused Mabel Peterson of having a tape recorder in her purse which she there upon emptied same on the table and demonstrated to the Grand Jury that there was no tape recorder in her purse. Mr. Gillman, another CPA accountant, claimed to have been intimidated by Mr. Bukey. The Grand Jury included a juror who worked for a filling station operator who had been sued for negligence in an action prepared by Defendant's office. In this first indictment, said David Bukey never mentioned "adjusted" gross income as being Eisenberg's felonies. He claimed gross income was unreported.

Prosecutor Bukey Obtains His Indictments

He repeatedly had witness Special Agent Robert Ubbelohde tell the grand jury Mr. Eisenberg had under reported his gross income. Any Grand Jury in the United States, fed such a lie, would have indicted without much question. The refusal to report gross income was deliberately referred to by Prosecutor David Bukey and Kelly's mentor Ubbelohde. See ¶ 4 of Bukey affidavit July 17, 1975. Why was it done? The answer is obvious, "get Eisenberg."

The sickening part of the allegations is that it is impossible for Defendant to have known his annual tax situation within any calendar year, since his records were never completed until some time later in the following year. He, therefore, could not possibly have any knowledge of the significance of any correct

income figures for the year involved. There was no proof of any kind either direct, indirect or circumstantial that Defendant knew any figures in any respect. The returns were prepared in the office of the CPA, submitted to Defendant at the last minute at the office of Defendant by the CPA or sent over for immediate signature and filing for the following year. Defendant cannot be held responsible when he was not a bookkeeper and relied completely on his staff and his CPA to make income tax returns legitimately and honestly. He knew nothing whatsoever of bookkeeping and could not audit machine-made records.

Obtaining the second indictment would have been an act requiring only minutes by Bukey from a Grand Jury. If they were told by Bukey that there was a previous indictment by a Grand Jury dismissed only because Defendant complained of a technicality? What chance would Defendant have? Bukey apparently only had Ubbelohde at the second indictment. It would have been enough to merely refer to "adjusted" gross witholdings, if anyone even understood the term. They certainly must have known of a previous indictment by a prosecutor who deliberately misled the first Grand Jury. The trial is arranged, for Mr. Bukey kept Mrs. Peterson for days in a locked witness room during the case although he never intended to call her and did not do so. She wandered into the courtroom, bewildered, after the government closed its case. She could have explained Eisenberg never saw the records involved, except perhaps checks he signed without question.

The local judges stood aside because of respect for the Defendant. The case was assigned to Federal

Judge Harlington Wood, who sat in Springfield, Illinois. Harlington Wood was appointed on May 7, 1976 as a member of the Court of Appeals in Chicago, and was sworn in on May 28, 1976. He had been a former U.S. Attorney and was hearing this case as a trial judge, although serving as a member of the Court of Appeals, much to the amazement of Defendant. This trial concluded June, 1976. Defendant was unable to find any written order permitting a Court of Appeals Judge to try this case.

Does the Defendant Know Too Many Facts About Wisconsin?

The Defendant was consulted by Ellis Hughes, publisher of the Milwaukee Sentinel then owned by the Hearst organization and was asked to assist in getting both sides to resolve the strike called against the Milwaukee Sentinel; failure to get the strikers to answer back on the telephone resulted in the paper being sold to the Milwaukee Journal. Many of the strikers went to work for the new owner, the Milwaukee Journal, who bought the Milwaukee Sentinel when the strike could not be settled. The Milwaukee Journal thus became the sole owner and publisher of two daily newspapers in Milwaukee. Defendant obviously knew most of the facts of a sad story. Mass thought control could now be practiced in Milwaukee under the guise of a free press which also owned the largest TV and radio stations, WTMJ, WTMJ-TV, WTMJ-FM. Another reason for selective prosecution?

Defendant on behalf of one Gregorio Maxaculi, unsuccessfully sought to have the FCC open hearings on objections to the Milwaukee Journal owning the TV

and radio stations, as well as publishing the programs of all smaller radio and TV stations. He protested to the Attorney General's Office and never received a hearing from the FCC. Instead Defendant was selected for prosecution in this case!

The situation was obviously bad for the freedom of all Milwaukee and Wisconsin residents. The Journal control was everywhere, with Journal and Sentinel reporters sitting in the courtroom facing the judge, notebook in hand, judging the judge and the case, to be printed by a one-sided press and broadcasted by radio and TV. Of these facts the Supreme Court should take judicial notice. Milwaukee has a "big brother" controlling its destiny. The selective prosecution file must have had notice of how the newspaper articles were accumulated; they printed them.

Certainly the refusal of the government to produce the missing documents, notes, entries in the IRS Intelligence file, prove by default the Defendant's claim of selective prosecution.

An examination of how IRS was operating in the years involved, will clarify the picture herein.

P. 81 of the Analysis (Excerpts From IRS Manual) PART IX Intelligence, Introduction-Organization, 911 HISTORY, Pg. 1 Original Organization states: "Under date of July 1, 1919, the Commissioner of Internal Revenue issued an order creating the 'Special Intelligence Unit' to direct the supervision of important investigations demanding more exhaustive inquire than could advantageously be made by officers assigned to work of a general nature. Such investigations were to be made by a corps of investigators designated as 'Special

Agents.' This order read in part as follows:

'There is hereby created in the Bureau of Internal Revenue an organization to be known as the "Special Intelligence Unit" which shall coordinate with the existing units of the Bureau. The purpose of this Unit is to concentrate the supervision and direction of investigations of such importance as, in the judgment of the Commissioner or the heads of the administrative units, demand more exhaustive inquiry than could be made advantageously by officers assigned to work of general nature.' "

The Analysis further states at P. 85, Suspected Criminal Violations in 9142.1 (1) as follows:

9142.1 Suspected Criminal Violations

(1) The investigation of Criminal cases may stem from information discovered by internal revenue agents in the course of their audits and examinations; by special agents who have the responsibility of developing such cases in the performance of their duties ; by Chiefs, Intelligence Divisions, through the exercise of their initiative in making surveys of selected individuals, groups, or activities; by Regional Commissioners, through Assistant Regional Commissioners (Intelligence) from surveys conducted for the purpose of identifying areas of evasion; by the Director, Intelligence Division, through analyses of cases, special studies, and surveys; and by revenue officers or other employees of the Internal Revenue Service in the performance of their duties. Information of multiple address changes and identical names involved in income tax refunds may be received from a service center. This information may indicate false claims for refund. Forms 1099. Information Returns, submitted by race tracks, may furnish a basis for referrals.

The case involved the years 1968, 1969, 1970. The International Products "wash" transaction of 1966 as well as a sale for several hundred dollars in 1969 of some insurance stock to Defendant's sister. She later returned to defendant and got her money back. Prosecutor Bukey was permitted to waste everyone's time by irrevelant remarks on this subject concerning two fine people.

Mr. Eisenberg at the suggestion of his CPA had the right to place all corporate stock in his name. The CPAs had the minutes and the duty to charge the records accordingly. Interest payments paid in advance could be computed by bank bookkeepers easily. The money was being borrowed? What was wrong with paying an advance interest payment even if there is not yet a written bill? The negotiations had been made obviously and the check sent as soon as the money was available. It was up to the CPAs to allocate it properly.

Mr. Bukey's knowledge of how the defendant handled millions of dollars of loans might be limited to an eight hour day. Defendant's day was a long one; he was not an accountant but people justly trusted him. He kept his word. He owed IRS not a nickel.

IRS Becomes A Machine Which Can Be Used By The Government to Destruct

During the late 1950s and early 1960s the IRS was becoming a semi military machine. Listening in on Eisenberg's telephone conversations is admitted in Hyatts affidavit of 2/10/76. Robert Ubbelohde, the Special Agent sent to bring the case to conclusion after the original special agent retired, signed an affidavit 2/19/76 that no evidence contained in the investiga-

tion file was in any way derived in interceptive oral or wire communication. An outright deception and mistatement of the truth, Mr. Bukey had to be aware of, since Hyatt's affidavit admits prior monitoring although the contents were concealed or absent from the file.

The Subcommittee on Constitutional Rights of the Committee on the Judiciary U.S. Senate, 93rd Congress, Second Session published in 1974, a documentary analysis printed by the U.S. Government printing Office.

In this report, Sen. Sam J. Ervin, Jr., Chairman of the committee, succeeded in penetrating the activities of the I.R.S. and some of their selective prosecutions. P. 56 of the Analysis reports that I.R.S.'s Special Staff currently had files covering approximately 3,000 organizations and 8,000 individuals; P. 88 of the report explains the organization of the Intelligence units within I.R.S. and its "coordinate with the existing units of the Bureau." The heads of administrative units could "demand" more exhaustive inquiry. A word to the wise was obviously considered sufficient. I.R.S. accountants knew they had better cooperate with their superiors.

P. 83 of the said Senate Analysis defines the I.R.S. Intelligence Mission in 2 (c): "Close coordination with the Audit and Collection activities to identify and combat local noncompliance situations."

P. 84 of the Analysis further defines the Intelligence Mission in 2(d): "Intensification of programs to expand geographical coverage and develop cases involving all types of violations in all income brackets spread over as many occupations, businesses, and professios as

possible so as to create sufficient impact on would-be violators that they will voluntarily comply with our taxing statutes."

P. 85 of the Analysis defines Suspected Criminal violation in pg. 3: "All Internal Revenue employees are required to be alert to indications of fraud or other possible criminal violations discovered in the course of their duties. Indications of such violations within Intelligence jurisdiction, upon their discovery, will be referred to the Chief, Intelligence Division, for appropriate action. Failure on the part of Service employees to report in writing violations or frauds within their knowledge is punishable by dismissal, fine, and imprisonment." (Section 7214 (a) (8), Internal Revenue Code of 1954.)

In a letter to Sam J. Ervin, Jr. from Donald C. Alexander, Commissioner, Internal Revenue Service, Mr. Alexander stated: "You will recall that I have previously announced that the Special Service Staff is being disbanded." P. 76. It was a misuse of authority to ever get it started. See 1974 Analysis.

On P. 77 in a letter from Sam J. Ervin, Jr. to Donald C. Alexander, Mr. Ervin, Jr. stated: "Since early last spring, the Constitutional Rights Subcommittee has been endeavoring to discover the full facts about certain Internal Revenue Service political surveillance, and about the relationship of those activities to similar ones conducted by the Department of Justice, the White House and other agencies involved in domestic surveillance. These activities pose serious issues of governmental invasion of privacy and constitutional rights which I know you, no less than the subcommittee, wish to have explored thoroughly. Certainly, insofar as the

Internal Revenue Service is concerned, there can be no greater threat to its tax collection and enforcement function than for it to be regarded as a governmental weapon to be employed against the political beliefs and expressions of American citizens. The Special Staff which collected 'domestic intelligence' and other non-tax-related information about 8,000 citizens and 3,000 organizations solely because of the views expressed by these persons and groups, presents the problem of political abuse of the Internal Revenue Service no less than the many other controversies which have focused on the Internal Revenue Service lately."

"What Judge Richey, in the case of the *Center on Corporate Responsibility v. Schultz*, termed 'the creation of a political atmosphere generated by the White House in the Internal Revenue Service' goes far beyond the circumstances of that one case. A number of legislative investigations of the Internal Revenue Service have resulted in words of praise for its apparent steadfastness in the face of this White House pressure. But I firmly believe that the questions raised by our previous correspondence with you must be fully explored in order to resolve charges that the Internal Revenue Service, through the Special Service Staff, has violated the constitutional rights of Americans whose only offense is that they happen to disagree with the government or with the present administration."

On P. 78, Mr. Ervin continues: "To deny Congress access to information on the Internal Revenue Service activity which was not property within its tax function on the grounds that the information is somehow protected by regulations pertaining to returns and other

tax-related information is not only paradoxical, but more than a little ridiculous. Unfortunately, the humorous aspects of the Services' position are outweighed by the fact that its only effect will be to frustrate the Subcommittee's inquiry into this subject. Quite clearly, only knowledge of the identities of the subject of this program as well as the scope of the non-tax-related information collected about them will disclose the nature, extent, propriety and seriousness of the Special Service Staff's activity. Such information is also necessary to determine the consequences of other government agencies' questionable political intelligence activities."

"Certainly you will agree that information which the Internal Revenue Service has no business gathering, which no other agency should properly transmit to the Internal Revenue Service, and which is not tax-related, cannot be kept from Congress under a regulation governing nondisclosure of tax returns. The Subcommittee required this information in order to conduct its investigation. I sincerely hope that it can be obtained with a minimum of further difficulty and in the spirit of cooperation which has so far characterized our relationship in this matter. I trust that it will not be unduly burdensome for you to make available to the Subcommittee on or before February 1, 1974, the list of Special Service Staff file subjects which the Subcommittee first requested July 12, 1973."

In another letter to Sam J. Ervin, Jr. from Donald C. Alexander, on P. 79, Mr. Alexander states: "As to our basis for declining to furnish your Committee a list of the names of organizations and individuals that were the subject of Special Service Staff files, I have

noted above that we believe these files have a direct relationship to the administration of the tax laws. Although my abolition of the Staff may imply that the Staff's activities were outside the proper scope of Internal Revenue Service concern, its files, nevertheless, were and still are subject to the Internal Revenue Code provisions designed to safeguard taxpayer privacy. In addition many of the files are classified because they contain materials furnished by the F.B.I. Therefore, information derived from these files cannot be disclosed except pursuant to appropriate authorization, such as is possible under Section 6103 (d) of the Internal Revenue Code."

Mr. Kelly, Mr. Ubbelohde and even the Courts have created a nightmare out of what should have been a routine civil I..R.S accounting and checkup.

P. 85 of the Analysis in pg. 2 states as follows:

> (2) Investigations may also stem from information received from other Government agencies: from application for the redemption of mutilated currency; from newspapers, magazines, and other publications; and from the general public. Chiefs of Intelligence Divisions in districts where local customs officers are maintained should request from such officers information relating to importers who are suspected of substantially underevaluating merchandise. This may be a lead to attempted tax evasion.

The "chilling" effect continued to spread unceasingly at P. 164 and 165 of the Analysis entitled: Special Service Staff: Its Origin, Mission and Potential. Prepared by ACTS:C:SS for Biennial Meeting of Regional Commissioners at Charlottesville, Virginia, November 1 and 2, 1972 (Confidential) in I — Introduction, states:

SPECIAL SERVICE STAFF: ITS ORIGIN, MISSION AND POTENTIAL

Prepared by ACTS:C:SS for Biennial Meeting of Regional Commissioners at Charlottesville, Virginia November 1 and 2, 1972
(Confidential)

1. Introduction

Recognizing the right to legally and peacefully protest, assemble, and petition the government is inherent in the freedom of each citizen. Any abuse of these rights reflects a chipping away at fundamental principles regarding rights, freedoms, and redress of grievances. There are those who readily condemn our present tax system and would tear it down if they could. Unreasonable demands are being presented to all levels of government as well as to private business.

> Unlike the violence and riots of the sixties, the early seventies have focused on a more threatening combination of protests and problems which are sure to carry us well into the seventies — likely escalating in intensity and frequency. Well organized protest groups have turned their attention away from the winding down Vietnam War issues.
>
> Today they are concerned with future strategies directed at the economic structure of this country with particular emphasis towards the Internal Revenue Service. . . .

Whether or not Defendant was one of the 8,000 or more individuals who were chosen selectively in the 1960's is not the issue alone here. The fact remains that the misconduct of the IRS in selecting Defendant is clear and convincing. A case was deliberately built against Defendant over a period of years. When it became clear that no income tax evasion was involved in any way, shape, form or manner, the IRS sought to

save the day by prosecuting on a false return charge on the theory it is only necessary to prove some mistakes. But Defendant never did knowingly sign any false return, he knew of no false return.

Since the Defendant did not prepare his own return, the IRS now seeks to throw the final blow to the American Constituition. If it has the authority in this case to indict anyone who happened to be a taxpayer; if he has a heart attack or becomes ill because of the indictment, the case is already won. For this reason there should never be selective prosecution in the United States. The 5th Amendment prohibits it, the 14th Amendment prohibits it, common decency prohibits the selective prosecution brought in the instant case. The term "substantial evidence" can never be used under the circumstances of the instant case without creating a grievous wrong which can never be corrected against an individual who simply "did not have it coming." Defendant hired a mass of bookkeepers and CPAs to prevent the very thing which happened. The Defendant owed nothing to the Government in the form of a tax.

There was nothing wrong in having his bookkeepers pay bills they believed due or which were truly owed. No one knew what the tax was in advance. Intent should be proven if so as not to turn every possible situation into a vicious one. This is un-American, wrong, and just plain vicious. Tax period cutoff dates like December 31 on the yearly bills are used by accountants as tax cutoff dates for those yearly bills. This case is not only a charade, it is a disgrace to every American. If the IRS wanted to change the taxpayers system, request had to have been made in writing.

Further at P. 165 and 166 of the Analysis, in II — Background on formation and mission of Special Service Staff, it states:

> Until the Special Service Staff was formalized February 11, 1972, its activity was considered semi-secret and apparently our people in the field were not knowledgeable of its mission and objectives. Investigate personnel particularly should be more familiar with this Staff's activity and mission as outlined.
>
> In IRM 113.654. Also, there is a need to increase field awareness of the importance of the investigative information furnished by the staff to district offices.

Page 167 of the Analysis, in IV — Potential usage and availability of Special Service Staff, states:

IV. Potential usage and availability of Special Service Staff

The files of the Special Service Staff contain vast amounts of information pertaining to types of individuals and organizations described. This material is received on a day-by-day basis and it has been impossible for the Staff to keep pace with this growth. As a result, although files have been established, there is a great deal of material which has not been evaluated, and consequently has not been referred to field offices.

This material is available to revenue agents, special agents, and revenue officers working on individuals or organizations involved on these left or right wing movements. One of the problems has been that examining personnel are not aware of the Staff, its mission or operation. As stated before, the time has now come when field personnel should be fully informed of the existence of the Staff and the type of information available.

Defendant had on occasion made calls to the IRS for taxpayers who claimed to have been manhandled on collection cases. Neither auditing nor records were involved, only meaness. Here was still another reason for IRS to single out a critical Defendant for prosecution and hope a court or jury might just simply "get him" out of the picture.

On P. 168, INTERNAL MANAGEMENT DOCUMENT -DIR-SLC Memorandum 52-5 C.R. 5(17)-2, Office of the District Director Salt Lake City, Utah. Subject-Revenue officer procedure in contacting certain locally identified tax protester cases, states at C. BACKGROUND:

C. BACKGROUND

1. There has been an increase in some taxpayer expressions of disatisfaction with government policies, income tax per se, or Internal Revenue Service procedures. Some of the protester groups oppose Internal Revenue taxes and Internal Revenue Service procedures on constitutional grounds. Each group obstructs the Internal Revenue laws, causes whatever disruption to the orderly process it can, tries to embarrass the government in the process and, finally, seeks all publicity possible for self-serving purposes.

In a Memorandum to All Directors from John J. Flynn, Regional Commissioner North-Atlantic Region, on P. 170 it states:

The first indictment was filed on Aprin 9, 1975, just six days before the running of the Statute of Limitations on Count I. This earlier indictment charged that the returns reflected "gross" income in certain amounts for the calendar years. The second indictment charged that the returns reflected "adjusted gross" income in those amounts for the same years.

The said first indictment, dated April 9, 1975, stated as follows:

That on or about the 15th day of April, 1969, in the Eastern District of Wisconsin,

SYDNEY M. EISENBERG

a resident of Milwaukee, did wilfully and knowingly make and subscribe a United States individual income tax return, Form 1040, for the calendar year 1968, which was verified by a written declaration that it was made under the penalties of perjury and was filed with the Internal Revenue Service, which said income tax return he did not believe to be true and correct as to every material matter, in that the said return reported gross income in the amount of $70,105.88, and interest expense in the amount of $63,670.66, whereas, as he then and there well knew and believed, he received substantial gross income in addition to that heretofore stated and the interest expense was substantially less than stated, in violation of Section 7206(1), Internal Revenue Code; 26 U.S.C. §7206(1).

COUNT II

That on or about the 16th day of June, 1970, in the State and Eastern District of Wisconsin,

SYDNEY M. EISENBERG

a resident of Milwaukee, did wrongfully and knowingly make and subscribe a United States individual income tax return, Form 1040, for the calendar year 1969, which was verified by a written declaration that it was made under the penalties of perjury, and was filed with the Internal Revenue Service, which said income tax return he did not believe to be true and correct as to every mate .! matter, in that the said return reported gross

income in the amount of $68,526.67, whereas, as he then and there well knew and believed, he received substantial gross income in addition to that heretofore stated, all in violation of Internal Revenue Code, Section 7206(1) and Title 26, Section 7206(1), United States Code.

COUNT III

THE GRAND JURY FURTHER GHARGES:

That on or about the 14th day of June, 1971, in the State and Eastern District of Wisconsin,

SYDNEY M. EISENBERG

a resident of Milwaukee, did wilfully and knowlingly make and subscribe a United States individual income tax return, Form 1040, for the calendar year 1970, which was verified by a written declaration that it was made under the penalties of perjury and was filed with the Internal Revenue Service, which said income tax return he did not believe to be true and correct as to every material matter, in that said return reported gross income in the amount of $38,012.00 whereas, as he then and there well knew and believed, he received substantial gross income in addition to that heretofore stated, all in violation of Section 7206(1), Internal Revenue Code; 26 U.S.C. §7206 (1).

A TRUE BILL: Dated 4/9/75

The second indictment was issued August 4, 1975, which alleges as follows:

That on or about the 15th day of April, 1969, in the Eastern District of Wisconsin,

SYDNEY M. EISENBERG,

a resident of Milwaukee, did wilfully and knowingly make and subscribe a United States individual income

tax return, Form 1040, for the calendar year 1968, which was verified by a written declaration that it was made under the penalties of perjury and was filed with the Internal Revenue Service, which said income tax return he did not believe to be true and correct as to every material matter, in that the said return reported adjusted gross income in the amount of $70,105.88, and interest expense in the amount of $63,670.66, whereas, as he then and there well knew and believed, he received substantial adjusted gross income in addition to that heretofore stated and the interest expense was substantially less than stated, in violation of Section 7206(1), Internal Revenue Code; 26 U.S.C. §7206(1).

COUNT II

That on or about the 16th day of June, 1970, in the State and Eastern District of Wisconsin,

SYDNEY M. EISENBERG,

a resident of Milwaukee, did wilfully and knowingly make and subscribe a United States individual income tax return, Form 1040, for the calendar year 1969, which was verified by a written declaration that it was made under the penalties of perjury, and was filed with the Internal Revenue Service, which said income tax return he did not believe to be true and correct as to every material matter, in that the said return reported adjusted gross income in the amount of $68,526.67, whereas, as he then and therewell knew and believed, he received substantial adjusted gross income in addition to that heretofore stated, all in violation of Internal Revenue Code, Section 7206(1) and Title 26, Section 7206(1), United States Code.

COUNT III

That on or about the 14th day of June, 1971, in the State and Eastern District of Wisconsin,

SYDNEY M. EISENBERG,

a resident of Milwaukee, did wilfully and knowingly make and subscribe a United States individual income tax return, form 1040, for the calendar year 1970, which was verified by a written declaration that it was made under the penalties of perjury and was filed with the Internal Revenue Service, which said income tax return he did not believe to be true and correct as to every material matter, in that said return reported adjusted gross income in the amount of $38,012.00 whereas, as he then and there well knew and believed, he received substantial gross income in addition to that heretofore stated, all in violation of Section 7206(1), Internal Revenue Code; 26 U.S.C. §7206(1).

A TRUE BILL:

Dated: August 4, 1975

Briefly, the second case was completely redone by the filing of said indictment in three counts for wilfully making and subscribing a false United States Individual Income Tax Return for the calendar years 1968, 1969 and 1970, pursuant to the provisions of Title 26, U.S.C. §7206(1). The falsity was alleged in 1968, in that the said return reported adjusted gross income in the amount of $70,105.88 and interest expense in the amount of $63,670.66, defendant knowing and believing he had not received substantial additional gross income and expended substantially less in interest; in Count 2, the alleged falsity existed in reporting adjusted gross income in the amount of $68,526.67, when defendant believed he had not received substantially

more adjusted gross income; in Count 3 in the reporting of the adjusted gross income in the amount of $38,012.00 whereas defendant is alleged to have known he received substantially more adjusted gross income. (Doc. 1) The failure to charge a net income violation was only a charge to continue the false charge of failure to report gross income. He never personally received any cash or checks so how would he know of the discrepancy. The amounts in the indictments were never confirmed by the trial court as actual figures. They were taken from outer space in so far as the truth was concerned.

On November 7, 1975, the defendant filed a series of motions (Doc. 2 through 16). In said motions the defendant moved successively for Judgment of Acquittal on the ground that the indictment, and each charge thereof, alleged he wilfully made and subscribed the income tax returns for the appropriate years, and that he did not in fact make such returns. This motion was supplemented by the defendant's affidavit that he did not in fact either prepare or make such returns.

The first Motion to Dismiss the indictment was based on the charge of selective and discriminatory prosecution on the basis of activities having no regard for the actual charges of the indictment. The third motion to dismiss the indictment was bottomed on the fact that the indictment did not allege a basis for venue in the Eastern District of Wisconsin, urging that venue for violation of the statute lies in the district in which the return is filed, not generally that they were "filed with Internal Revenue Service". The third motion to dismiss the indictment proposes that the defendant was not adequately warned in that he was advised

that if he fraudulently made and subscribed to the returns he did so under penalties of perjury, not the provisions of Section 7206(1). The fourth motion to dismiss the indictment charged the government intentionally delayed the return of the indictment to gain tactical advantage over the defendant and that the defendant was substantially prejudiced thereby by deprivation of an adequate opportunity to defend himself. Specifically he points in his affidavit in support of this motion, to the death of his thirty (30) year accountant in November of 1970. He also asserted in said affidavit reason to believe that agents of the Internal Revenue Service had examined his financial records during the years 1969 through 1972 and that the government had no justifiable basis for the almost four (4) year delay since the last alleged violation in bringing the indictment. The fifth motion to dismiss the indictment made objection to expanding the scope of Section 7206(1) which requires a wilful making and subscription of a return, but makes no reference to knowledge, whereas the indictment charges that the defendant did "wilfully and knowingly" make, etc. The sixth motion to dismiss the indictment asserted the defendant's rights under the Fifth Amendment had been violated because the grand jury which returned the indictment neither read nor understood it, but rather rubber stamped it at the request of the Assistant United States Attorney "assisting" the grand jury, and asked for a review of the minutes of the grand jury which defendant asserted would demonstrate that no evidence was presented to it which would show the defendant himself made the returns which were alleged to be fraudulent. The seventh motion to dismiss the indictment was directed against the Assistant United States Attorney's mis-

conduct and his abuse and mistreatment of witnesses, who by virtue of their position would tend to be favorable to the defendant. This was supported by an affidavit by Mable M. Peterson, an employee of the defendant, who avowed she was accusatorily questioned by an Assistant United States Attorney about bringing into the grand jury a tape recorder, which accusatory interrogation was demonstrably untrue. The affidavit prompted an explanation to the grand jury that on an earlier occasion Eisenberg had recorded a conversation wherein he asked what he had done wrong and was told perhaps the entire inquiry by IRS may have been worthless. Mr. Bukey said that recordation was made in violation of the United States Code, thus implying to the grand jury that Mr. Eisenberg was of a criminal predisposition and would not hesitate to engage his employees in criminal acts to the defendant's prejudice.

A motion was also made to dismiss count one on the basis that it was barred by the statute of limitations contending the savings of provisions of Title 18, U.S.C. §3288 did not apply because the government, of its own accord, moved to dismiss the earlier indictment, and such dismissal was over the objection of the defendant. The defendant also moved for discovery of the special agent's report. (Doc. 12)

In addition, defendant moved for an en camera inspection of any government surveillance of the defendant from January 1, 1968 through the time of the return of the indictment. (Doc. 13)

Defendant also moved for production of exculpatory evidence under *Brady v. Maryland*, 373 F.2d 81, 87, and

for discovery under Rules 16 and 18 U.S.C. §3504, as well as particulars.

On January 5 the defendant filed another series of motions (Documents 19 through 21) asking for disclosure and suppression, the disclosure relating to the date the case was referred to the intelligence division of IRS and suppression of all statements of defendant made after such date, not preceded by a Miranda type warning; for suppression of all evidence derived by the government through use of subpoenaes issued after June 29, 1971.

On February 3, 1976 Defendant again filed a series of motions, (Doc. 24 through 27). The first was to dismiss the indictment on the ground of the jury selection not being fairly representative of the community, particularly so far as representation of minority groups was concerned, a motion to review the decision to the refusal to dismiss Count One and, further, to quash the indictment on the ground that the government's denial of the existence of a mail cover was false and untrue, and lastly on the ground that an unqualified person was a member of the grand jury returning the indictment. These Motions, except for opportunity to inspect documentary evidence relative to the grand jury selection, were denied rather summarily. (Doc. 29)

On June 14 Defendant again moved to suppress all books and records, that had been reviewed by revenue agent Terrance Kelly covering the period from 1969 to 1972 on the ground that he presented himself as a revenue agent conducting a civil audit and continued the civil audit after he had commenced a criminal tax investigation without advising the Defendant of the change of the posture of the investigation in violation

of Administrative Directives of the Internal Revenue Service. (Doc. 32)

The cause proceeded to trial on June 15 (hearing on suppression going first) and continued on successive court days through June 29. Trial was had by the Court, a member of the Court of Appeals sitting without a jury, and on June 29 Defendant was found guilty as charged and fined $3,000 as to each of Counts 1 and 3 and $1,000.00 as to Count 2 (Doc. 35) Defendant had been unable to find a written order permitting Appeals Judge Wood to try this case.

The Defendant's post trial motions were denied on December 10, 1976 and Notice of Appeal to the Court of Appeals was filed December 17, 1976. (Doc. 41 and 42)

Petition for Certiorari is now respectfully made to the U. S. Supreme Court.

When the Cates bill was resolved, after a lawsuit was convinced, proving Cates had been paid one $55,000, the difference was reported on the books and income tax records.

In truth and fact, a person charged by the Government has to be charged with an intelligible crime or he cannot be charged with any crime whatsoever, to say nothing of three "felonies" of which he has no knowledge and part of a mass of records involving events as old as 9 years previously.

Defendant was given no notice as to the correct date as to when the Grand Jury met with respect to the second indictment except that he learned that the government admitted without shame errors had apparently been made on the second indictment, errors had, of course, admittedly been made on the first

indictment by the government attorneys as well, and there was no way Defendant was going to know what the Government was actually claiming until the testimony came out and that there was nothing he could do about it. The pressure was on. Sydney M. Eisenberg had to be brought to his knees. Eventually, he was the victim of a cerebral stroke. During the trial, the courtroom was extremely cold, Defendant coughed constantly while he was in a cast with a broken leg. Nevertheless, the case had to go on. He was discouraged and sat in the back of the courtroom. He is now in the coronary unit of Mt. Sinai Hospital with a massive heart attack.

Defendant had to worry about making a living, watch the progress of some 700 stocks in his stock portfolio, not the 400 which the IRS later claimed he had, practice law, renew and pay millions of dollars worth of loans and bills, watch the progress of renting and maintaining 500 or more apartments which he owned, and tried to find out from bookkeepers, what was going on although he had no knowledge of bookkeeping, had never kept a book and depended on bookkeepers and Certified Public Accountants to prepare his records. He knew not one side of a ledger from a sausage. Complaints had to be met from clients, tenants, bill collectors, employees, legal opponents, judges, reporters and a host of others. There is not one scintilla of evidence to prove that the Defendant ever even saw any bookkeeping records. He never made an entry and no one ever claimed that he knew anything about bookkeeping throughout the trial. That he signed returns that were handed to him the night before they were due and a long thorough examination would have done no good since he knew nothing

about bookkeeping, to say nothing about the computer which recorded almost all of the records that were involved. Judge Wood commented that a bookkeeper in a previous year to 1968 had given Defendant some blank checks. Said blank checks, incidentally, are still blank and are still in the bookkeeper's filie. Defend- seldom looked at checks he signed because they meant very little to him since he didn't keep any records.

The pictures of Defendant's desk and his home with relationship to the thousands of papers piled high over his desk and chairs and throughout his home were wholly disregarded by the Trial Court, notwithstanding the fact that pictures speak louder than words. Nowhere in these pictures is there evidence of any bookkeeping record whatsoever to acquaint Defendant with the facts that he is supposed to have been aware of before he was indicted and found guilty of three "felonies" in this case.

This case is purely and simply a complete miscarriage of justice. The law was never designed to permit IRS to turn people like this Defendant, under the facts, into a "three time felon" for no logical reason under the sun.

The entire operation herein became one of "papering the file" and obfuscating justice by the U.S. The IRS has simply gone "wild" if this case is allowed. This meant in plain English that every possible record, letter, note and memorandum covering not only the three years which were involved in the indictment, namely, 1968, 1969 and 1970, but transactions were brought in involving the years 1966 and 1967 and previous years. The case was heard in 1976, 10 years after but the fact that nothing had been done illegal in 1966

and 1967 did not seem to make any difference either. Anything could come into evidence as part of a claimed pattern of some type.

Wash Sales

A "wash" sale involving All Star Insurance Co. "over-the-counter" stock was referred to the court as if a "washout" sale were illegal. This was simply absurd because there was simply no violation of any law.

Mr. Bukey, the Asst. U. S. District Attorney, spent a tremendous amount of time on the subject of this "wash" sale, although the "wash" sale, prior to the actual years involved, was never illegal in any respect. The tax computation has nothing to do with the years 1968, 1969, and 1970. A previous "wash" sale cannot be a pattern as suggested to the Court to get the Court to allow other "papered" testimony in because no other "wash" sales were involved; in fact, anyone can legally make "wash" sales very day of the week. A "wash" simply was a situation where the Defendant herein sold a stock and a corporation headed by Defendant bought an equal amount of stock the same day. If the IRS thought the sale and purchase a "wash" one, it could never claim the sale "illegal." Certified Public Accountant Levine said the transaction was made at his advice; he saw nothing wrong. But the government turned a deaf ear.

The abysmal failure to understand stock transactions pervaded the entire hearing. The theory seemed to be that by throwing mud, some of it would land and splatter the Defendant. The fact that mud is not necessarily bad, and is even used by some people to improve their facial condition, appeared to be immaterial.

A sale in Gisholt stock, which also preceded the years involved, referred to ownership by two corporations. Certified Public Accountant Gillman himself conceded that he had only reported half the gain by a corporation owner believing that he had made his calculation in good faith; there is nothing to show that Defendant could possibly know that Mr. Gillman in his own office, had made any error in computation. Defendant for years believed a long term gain was only reportable at 50% anyways. But it was up to the CPA to make out the returns, not the Defendant. There was, in fact, nothing due and owing for taxes, because Defendant's bookkeepers and accountants over-looked large deductions which Defendant was entitled to. But even with not tax due, the charade against Defendant was nevertheless continued. There was no wrongdoing whatsoever by Defendant. The entire case was clearly part of a mud throwing scheme: nevertheless, the scheme worked. Justice was thwarted completely and IRS succeeded in a case which could only cause consternation and fear to every honest taxpayer who depended on a CPA to prepare his tax records and return.

The Plaintiff Government obviously considered the two indictments to cover entirely different situations. The first was a cheap shot at a jury to confuse them with many transactions, since there was no jury, the emphasis was that Defendant knew all about everything, so he must be cheating the government. A twenty-one carrat untruth by the IRS on both scores. But permissible under the selective prosecution theory. Yes, a perfect case to frighten the average public.

Course of Indictments

The first indictment was dismissed August 22, 1975, which indictment by the Grand Jury took place eighteen days before the first indictment was dismissed. As to the second indictment, under date of August 8, 1975, Asst. U. S. Attorney Bukey, wrote a letter to the judge and then counsel for Defendant, stating that the actual date of the new indictment was not actually August 4, 1975, although the indictment stated it was, but that the actual date of the indicement should have been September 4, 1975, instead of the return date of the idictment dated August 4, 1975. The "mumble jumble" of this case turned into utter confusion, insofar as the Defendant was concerned.

The letter from Mr. Bukey further stated that discovery material made available to the client in connection with the prior indictment was the same discovery material pertinent to this charge, leading the Defendant to believe that it was impossible to further continue and discovery examination of the records, particularly all the missing copy.

Defendant up to this point had no inkling, whatsoever, as to what the indictment was all about. Every attempt to find out what the investigation was about had ended against a stone wall. The IRS went everywhere telling everyone that they were on a "criminal investigation" against Sydney M. Eisenberg but revealed nothing to Defendant's accountants except to admit there was no income tax evasion.

In the first indictment, IRS charged that Defendant failed to report substantial gross income. This meant purely and simply to Defendant that there was a false claim by IRS that Defendant's bookkeepers did not

report everything that he received. Defendant knew this was untrue because everything received was recorded and should have been in his income tax returns as made out by his Certified Public Accountants. The first indictment stated in Count I that the gross income was in excess of $70,105.88 for the year 1968 and his interest expense was less than $63,670.66. The second count again involved failure to report gross income and a third count provided that he failed to state gross income. How could Defendant audit his C.P.A.'s who Defendant believed should know what was proper and what improper? Their name was signed on each return as the preparer. The government figures simply escape reality if "rollovers" were considered.

The government Witnesses Proved Nothing Wrong

The two CPA's who prepared the returns and signed same never testified they believed ever that the returns were wrong in any respect. Why should Defendant believe anything was wrong? Why should any reasonable person?

There was no jury or court trial on the issues of the first indictment. Although there was not one scintilla of actual trial evidence presented to the court that this indictment was technically defective in the form of actual testimony, the judge, on August 22nd, after the Statute of Limitations had run, dismissed the indictment. Judge Arlington Wood merely stated "that leave of court is granted for the filing of the foregoing dismissal, consideration having been given to Memoranda of the parties filed on this issue."

The Court never specifically granted leave for a second indictment to stand in this Order. The Order for Dismissal merely makes a statement by Assistant D.A.

Bukey: "Pursuant to Rule 48(a) of the Federal Rules of Criminal Procedure and by leave of court endorsed hereon the United States Attorney for the Eastern District of Wisconsin hereby dismisses the indictment against Sydney M. Eisenberg, defendant, for the reason that the indictment is technically defective." Judge Wood's consent to the dismissal nowhere provides leave of Court to obtain a second indictment.

The second indictment, signed in the handwriting of the Foreman of the Grand Jury and William J. Mulligan, United States Attorney, was dated August 4, 1975. That indictment, as aforesaid, states in effect that the Defendant received substantial adjusted gross income in addition to that heretofore stated for the year involved and in the third count for the year involved that he received substantial adjusted gross income. Defendant does not know to this date what is meant by "substantial adjusted gross income." The record involved here was so "papered" by the government that Defendant to this date does not understand what he was being charged with as to three felonies; neither can any other reasonable person who reads this record understand what the criminal felony charges were against the Defendant. The interest charged was for money due the bank. Did IRS make the terms of the loan? The interest was regular, the check sent out as soon as it became available. Its just that simple. No witnesses testified any differently for the government. Not one bank official denied the transaction was made over the telephone. Notes of course, were signed.

COUNT ONE OF THE INDICTMENT SHOULD BE STRICKEN AS TIME-BARRED

The Indictment, charging false statements on the returns of this defendant for the calendar years 1968 through 1970 ,and filed on the 15th of April of the respective succeeding years, was filed on September 5, 1975.

It seems apparent that the six year statute limitation on Count One ran on April 15, 1975, and that the Motion to Dismiss said Count on that basis (Doc 11) was valid, and should have been granted.

The government, however, relied on the saving provisions of Title 18, U.S.C. §3288, extending the statute for an additional six months, and the Court below sustained that reliance, we submit, improperly.

The facts are undisputed. An original indictment was filed on April 9, 1975 just six days before the running of the Statute of Limitations on Count I. This earlier indictment charged that the returns reflected *gross* income in certain amounts for the calendar years. The second indictment charged that the returns reflected *adjusted gross* income in those amounts for the same years. The first indictment was dismissed on motion of the government over objection of the defendant on August 22, 1975. (Doc. 25, 2nd Exhibit). The question, of course, is whether the first indictment had been "found" to be defective or insufficient within the contemplation of §3288 so as to activate the six-months grace period, and, if so "found," if that finding is correct.

Section 3288 provides in pertinent part:

> "Whenever an indictment is dismissed for any error, defect, or irregularity with respect to the

> grand jury, or an indictment * * * is found otherwise defective or insufficient for any cause, after the period prescribed by the applicable statute of limitations has expired, a new indictment may be returned in the appropriate jurisdiction within six calendar months of the date of the dismissal of the indictment * * *."

We respectfully submit the first indictment was neither defective nor insufficient, but was wholly valid in charging a crime under the statutes of the United States on the evidence presented to the grand jury, and it was the only indictment that could be returned on the evidence presented. This is obvious from the motion filed by the United States seeking dismissal. Either Defendant had secreted or withheld money or he didn't. The truth is he did not.

> "4. Affiant further alleges that testimony concerning the above-described items of 'adjusted gross income' and alleged underreporting of 'adjusted gross income, were presented to the Grand Jury which returned this indictment, but were mistakenly characterized in that proceeding as 'gross income' in both the questioning of counsel and the testimony of Special Agent Robert Ubbelohde." (Doc. 25, 1st Exhibit

The sole difficulty was that the indictment charged a crime the government could not hope to prove. It should never have had a second kick at the cat.

Indeed, some authorities hold Section 3288 applies only where a defendant succeeds in securing dismissal for error, defect or irregularity, and not in a voluntary dismissal. *United States v. Wilsey,* 10 Cir., 456 F.2d 11, 12.

Whatever the preponderance of authority on that point, there is no question that the word "found" in the statute must be given effect.

The stock issue in moot because the corporation resolutions gave Defendant the right to sell the bonds and buy stock. His purpose, the CPAs conceded was to avoid raising rents. An equal amount of bond money went into the stocks. The corporation made no real profit because they were renting at a loss anyway. Defendant was a good man and tried to help people with low rents. At his accountant's advice, who suggested raising the rents, Defendant said "no." So now he is a three time felon or does he have an apology coming? His attorneys were not convinced there was any case; they didn't bother to even put in a defense. There was nothing to defend. If there was no case, please reverse this case. Let's put honor back into the IRS.

"However, neither the statute, nor the ruling has anything to do with the case. It would have been material, if the 1934 indictment had been 'found' by the court to be 'insufficient,' but it never was so found. As we said before at some length, exactly the opposite was the case; the indictment of 1934 was good, as against Strewl; its only 'insufficiency' was that it failed to include other conspirators who were equally guilty as he. It is apparent from a mere glance at the statute that that is not the kind of 'insufficiency' which Congress had in mind. The purpose was to extend the statute of limitations, so that a person who had been indicted under an indictment which, as it turned out, would not support a conviction, should not escape because the fault was discovered too late to indict him again. It would be absurd to apply it to a case where the indictment was perfectly good so far as it went, but did not include all those guilty." *United States* v. *Strewl*, 2 Cir., 162 F.2d 819, 820

The original indictment in this case was never found to be insufficient nor deficient. Why is defendant singled out against everyone else who signed this return? The answer is clear; selective prosecution.

We are not here concerned with legal pitfalls in indictments, as those terms are used in *Mende v. United States*, 9 Cir., 282 F.2d 881, 884, a case on which the government relied below, and in which it contended it could see no distinction from the case at bar. Though the *Mende* case as reported is not overly specific, the *legal* pitfalls — as opposed to factual allegations — seem obvious as clear duplicity in pleading.

> "This is a mail fraud case. The first point on appeal concerns, because of the statutes of limitations, the effect of bringing in a new indictment which dropped the word 'either' and changed one 'or' to 'an,' plus the substitution of the word 'allegations' for the word 'violation.' " (282 F. 2d 882)

Duplicity is a legal pitfall. Changing allegations of fact is, by definition, not such a pitfall. Count I is out of time.

The propriety of granting a motion to dismiss an indictment by pretrial motion is by and large contingent upon whether the infirmity is essentially one of law or involves determinations of fact. *United States v. Miller*, 5 Cir., 491 F.2d 638, 647 and cases cited in fn.15.

An indictment alleging gross receipts (or income as opposed to adjusted gross income) was found good as against a motion to dismiss or to quash in *United States v. Anderson*, W.D. Ark., 254 F. Supp. 177, 180 and in *United States v. Marra*, 6 Cir., 481 F.2d 1196, at 1199, quoting with approval from the lower Court's opinion:

> " 'Thus, the Court finds that the indictment is

neither vague nor indefinite. An offense is charged, and defendant is well aware of the nature of the offense and the underlying transactions which form the basis for the charge. Therefore, the indictment fully complies with all of the requirements of the Fifth and Sixth Amendments to the Constitution of the United States and Rule 7(c) of the Federal Rules of Criminal Procedure.'

"[1] A reading of the indictment makes clear the correctness of the foregoing.

"In dealing with the factual and defensive allegations of appellant's affidavit supporting his motion, the District Judge said:

> " 'Paragraphs 3a., 3b., 4a., and 4b. of defendant's motion raise factual issues. A trial is the appropriate place to resolve these issues. A motion to dismiss the indictment cannot be used as a device for a summary trial of the evidence. The sole function of this type of motion is to test the sufficency of the indictment to charge an offense. U. S. v. Sampson, 371 U.S. 75 [, 83 S.Ct. 173, 9 L.Ed. 2d 136] (1962); U. S. v. Luros, 243 F.Supp. 160 (N.D.Iowa, W.D.1965); U. S. v. Winer, 323 F.Supp. 604 (E.D.Pa. 1971). The Court should not consider evidence not appearing on the face of the indictment. *Winer, supra.*'
>
> "The District Judge's recited reasons for his ruling are so clearly correct that we need not support them with our own dissertation."

No finding could have been made on motion of the defendant of legal insufficiency on the face of the first indictment. The same want of legal insufficiency must obtain where the government makes the motion, as the street should run both ways. The statute of limitations does not toll under any statute or rule at the whim of the prosecutor. Count I should have been dismissed.

THE INDICTMENTS SHOULD BE DISMISSED FOR SELECTIVE AND DISCRIMINATORY PROSECUTION

On November 7, 1975, this defendant filed to dismiss this indictment on the basis of selective and discriminatory prosecution. The motion was supported by an affidavit of the defendant, who stated that, upon review of the investigative files prepared by the government leading to the prosecution, he observed numerous news clippings relating to a disciplinary action taken against him, a lawyer, by the State Bar of Wisconsin. Defendant requested an evidentiary hearing to adduce evidence demonstrating the sole reason for his having been prosecuted is that he engaged in activities which were protected by the First Amendment, more specifically that he had spoken out on the subject of judicial qualifications. This affidavit was supplemented by newsclippings found in the file of Internal Revenue which were either improper considerations for this indictment or domestic surveillance, both constitutionally offensive. (Doc. 2) Is free speech now a reason for an IRS persecution? The answer is, "NO", "never."

Again, on January 5, 1976, the defendant moved to suppress all statements of, and evidence produced by, the defendant or anyone else after June 29, 1971, (Doc. 19 thru 21), pinpointing that date by an affidavit of a Special Agent of the Internal Revenue Service, Robert Ubberlohde, wherein he stated that was the date of referral to Intelligence. The defendant also moved for production of documents, revealing the existence of "Project Ace" which gives special priorities to the prosecution of tax offenses by attorneys and other professionals and for the production of Internal Revenue Manual 9180. Intelligence Tolerance and Criteria Handbook, as established by "Project Ace."

"Project Ace" is referred to in *United States v. Swanson,* 8 Cir., 509 F.2d 1205, 1208, which recognizes that lawyers, among others, are given a special (and dubious) priority in prosecution by the Internal Revenue Service. The *Swanson* case attorns to a "reasonable prosecutorial discretion" as inherent in our judicial system, "unless it is deliberately based upon an unjustifiable standard such as race, religion or other unjustifiable standard." While this sounds fair enough, if vague to the point of obfuscation, it is not factually correct. The prosecutor, in tax cases, has no prosecutorial discretion, as we thought everyone was aware. The internal revenue service directs prosecution and manipulates the statutory authority of the prosecutor to implement that direction. Thus, when we examine the facts to determine whether there has been employed an unjustifiable standard, we use the viewpoint and restrictions that should standardize Internal Revenue's acts in regard to good — or bad — faith.

We, thus, refer the Court to the hearing engendered by these several motions described above.

Under the evidence, Revenue Agent Kelly began reviewing the 1968 return shortly after it was filed (Tr. 24), a situation which is also true of the 1969 and 1970 returns. On March 25, 1970, Agent Kelly had a conversation with one Mr. Howe, a Special Agent in the Intelligence Unit, who enquired of Mr. Kelly whether or not he had a return of Eisenberg and what was the status of the investigation at that point.

The Court below was little concerned by this contact, and overlooked the common sense relationship of Revenue Agent Kelly to the Intelligence Division. Kelly immediately plunged into the breach, not he to

have overlooked evidence of fraud in a case where Intelligence has expressed an interest.[1] Thus, Kelley indicated that, based on the source and application of funds, it appeared as though there was an amount of approximately $175,000.00 of expenditures and Kelly could not account for a source of funds coming in to cover. Kelly also told Howe that Eisenberg owned some 400 securities and that he could find no purchase records for a large number of them. (Tr. 42-45) In further response to the Audit-Intelligence relationship, Kelly told Howe he had been thinking of referring the case to the Intelligence Division. (Tr. 46-47) Again, modest inquiry finally disclosed loans on stock sales that negated the $175,000 (Tr. 46), and purchase records for the approximately 80 to 100 securities.

---

[1]Cold figures support this human inclination. Before notification of the mysterious interest of Intelligence in Mr. Eisenberg, Kelly had worked 339 hours on the case. Aroused to that interest, he devoted another 854 hours to ripen the matter for referral.

Kelly had another conversation with Howe in July or early August. Between these two dates he had received the needed information from Mr. Levine, one of the defendant's accountants. In May of 1971, he interviewed the defendant himself. The testimony is pertinent to this argument:

"Q. You did interview Mr. Eisenberg in May of '71?

"A. That is correct.

"Q. And I'm sure you're familiar with the Internal Revenue Manual?

"A. Yes, I'm familiar. Yes. I know what it is. And I from time to time, I do research and read aspects of it, yes.

"Mr. Kelley, you know that the manual provides that, 'If during the course of an examination a Revenue Agent discovers indications of fraud he shall suspend his activities at the earliest opportunity without disclosing to the taxpayer, his representative or employees, the reason for such suspension. He will then prepare a report of his findings in writing. Do you recognize that as —

"A. That is, yes.

"Q. As a portion of your instructions under the manual?

"A. That is correct.

"Q. And that the purpose of the referral report is to enable the Intelligence Division to reevaluate or evaluate the criminal potential of the case and decide whether a criminal investigation should be initiated?

"A. That is correct.

"Q. You also realize that at the earliest opportunity they say, "It dcesn't mean immediately, but that it means at the earliest point after discovering firm indications of fraud, this means more than suspicion, it means the agent has taken steps to perfect the indications of fraud and develop them to the degree neccessary to form a basis for a sound referral". Do you recognize that?

"A. I do.

* * *

"Q. 'This referral —

"A. Yes.

"Q. — must be done at the first instance while the books and records are available to the agent, because later on they may not be accessible and information contained therein may be impossible to obtain'. Do you recognize that that is within your administrative responsibility?

"A. In essence I recognize it, but not in total as that while the records are in my presence, or you know, are available to me, I'm not —

"Q. You're admonished by the manual, are you not, that 'The overextension of the examination may jeopardize criminal prosecution by giving the taxpayer a basis for claiming that the criminal case was substantially built by a Revenue Agent under the guise of making an audit for civil purposes'. You're aware of that?

"A. Yes.

"Q. And are you also aware that 'The agent should not discuss the taxpayer's case with Intelligence prior to the submission of the referral report. After the referral report is submitted there should be no further contact with the taxpayer until the referral is either accepted or rejected'?

"A. That is correct.

"Q. And we are talking about the Period April 1st, 1970. And when did you draft your referral report?

"A. My report was submitted on June 24th, 1971.

"Q. Some 16 months after you had talked with Mr. Howe?

"A. That is correct." (Tr. 47-50)

We emphasize that the referral report was made on June 24, 1971, some 16 months after the first meeting with Howe. (Tr. 50) Kelly interviewed Eisenberg on May 25, 1971 (Tr. 47), and a memorandum was made of that interview. (Tr. 53) Kelly never gave Eisenberg his constitutional warnings between March of 1970 and June of 1971, nor at the time of the interview on May 25, 1971. (Tr. 53-54)

Under questioning by the Court Kelly testified that he had never before had the Intelligence Division

check with him before referral. His explanation was that this was some kind of "case development" which provoked the interest of the Intelligence Division (Tr. 67-68), but what a "case development" constitutes was never disclosed. (Tr. 68) The Court of Appeals refers to this as a stack of newspaper clippings. Defendant is not ashamed of them.

Nor was anyone further enlightened by Mr. Howe (Charles W. Howe, Group Manager for the Intelligence Division). Howe estimated the Intelligence file was opened on Eisenberg in summer of 1969, and he was given the file when he took over as Group Manager. Howe had no idea why the criminal intelligence file was opened. But his ignorance did not disabuse him of the fact that the file had significance and that he, as an Intelligence Agent, was expected to do something about it. Thus, in early 1970, January or February,[2] he sent for Eisenberg's returns "because we had this case development assignment." (Tr. 71-73) But the targeting aspect of the criminal "case development" is implicit in the record:

---

[2] He requested the 1968 return on February 9, 1970. (Tr. 76)

'Q. Do you know why Mr. Eisenberg was made a target of this special development?

"A. No, I don't.

"Q. You don't know who initiated the file, case development?

"A. As I said before, the Chief of Intelligence Division gave each group two or three case development items.

"Q. This was one given to your group?

"A. Correct.

* * *

"Q. You don't know the basis for giving it to your group?

'A. No." (Tr. 75)

And this targeting was inaugurated, notwithstanding that nothing in the file related to matters over which Internal Revenue was in any way concerned, nor over which it had any jurisdiction. (Tr. 74) The very fact that there were but *three* "case development" matters assigned "specifically by the Chief" that year (Tr.84) carries its own significance.

He then called for Revenue Agent Kelly on March 25, 1970, and his report of the interview is substantially the same as Kelly's, with minor variations. He said Kelly had the 1966 through 1968 returns for audit and indicated there was some unexplained stock transactions totaling about $175,000 and that either on that date or at the next meeting he said he might be considering referring the case to Intelligence. Kelly told Howe that Eisenberg was very active in the stock market and that he owned about 400 different securities and that for 80 to 100 of those securities he could not find purchase records and that referred to the $175,000. Howe testified he recognized that if Kelly as an audit agent continued to pursue his own investigation it would be continued in the informal manner it had been before, where all books were made available to him, but he recognized that it would not be unusual that if Intelligence came in at that time that would probably mean the end of cooperation so far as the taxpayer was concerned. A couple of months later Howe contacted Kelly again relative to Eisenberg and the response was that the audit was still in the state of

suspension. This was on July 8, 1970. As a result of that he closed the file in the Intelligence Division on July 9th. He testified to a recognition that audit agents are not to discuss the taxpayer's case with Intelligence prior to the submission of a referral report under administrative policy and also recognized that on two occasions prior to the referral report he did have conversations about Eisenberg with the audit agent Kelly. (Tr. 71-82)

> "[1] An agency of the government must scrupulously observe rules, regulations, or procedures which it has established. When it fails to do so, its action cannot stand and courts will strike it down. This doctrine was announced in United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260, 74 S.Ct. 499, 98 L.Ed. 681 (1954). There, the Supreme Court vacated a deportation order of the Board of Immigration because the procedure leading to the order did not conform to the relevant regulations. The failure of the Board and of the Department of Justice to follow their own established procedures was held a violation of due process. The *Accardi* doctrine was subsequently applied by the Supreme Court in Service v. Dulles, 354 U.S. 363, 77 S.Ct. 1152, 1 L.Ed. 2d 1403 (1959), and Vitarelli v. Seaton, 359 U.S. 535, 79 S.Ct. 968, 3 L.Ed. 2d 1012 (1959), to vacate the discharges of government employees. See also Yellin v. United States, 374 U.S. 109, 83 S.Ct. 1828, 10 L.Ed.2d 778 (1963). And the *Accardi* doctrine has been utilized by the courts of appeal [Cases Cited]" *United States v. Heffner*, 4 Cir., 420 F.2d 809, 811.

This Court will readily recognize this case goes far beyond "Project Ace", where, as we said, certain classes are given preferential treatment. Here we have a specific individual, with nothing detrimental (so far as Revenue is concerned) singled out and aim taken.

Here we have a defendant who was a "focus" before anything was known of him.[3]

---

[3]Except that he was a subject of publicity, about which we shall comment more fully hereafter.

[4]It should be noted that *Beckwith* was given the warning directed by the Internal Revenue Manual (see 96 S.Ct. at 1617, Mr. Justice Marshall concurring). Under these circumstances, this case should be governed by this Court's decision in *Dickerson*.

We note, of course, the *Beckwith* decision (*Beckwith v. United States*, 96 S.Ct. 1612), which parted company with the Court of Appeals, as enunciated in *United States v. Dickerson*, 7 Cir., 413 F.2d 1111.[4] But whatever erosions of the Fifth Amendment occasioned thereby, the dignity of the Courts of the United States should reject involvement and participation in a shoddy procedure that first draws its sights on a citizen of the United States — without cause — and invokes the complex tax laws to charge its gun. We invoke the supervisory powers of the Court in urging reversal of this conviction.

> "Uniform justice is not achieved in the face of such disparity which, if not in actual violation of the Constitution, is, at least, outside the penumbra of fair play." *United States v. Jacobs*, 2 Cir. 531 F.2d 87, 90.

This supervisory power extends to all federal courts and is available whenever the administration of justice is tainted by the misconduct of government officers and agents. *United States v. Banks*, W.D. S.D., 383 F.Supp. 389, 392.

Federal Courts have supervisory powers over federal prosecutions which may be invoked without reaching any constitutionally based determination.

This power is based upon *McNabb v. United States,* 318 U.S. 332, 340 (1943), where the Supreme Court through Justice Frankfurter noted that '[j]udicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence." Since *McNabb* this supervisory power has been utilized to suppress evidence, and even to dismiss entire prosecutions where governmental bad faith conduct caused "the waters of justice [to be] polluted", *United States v. Banks,* 383 F.Supp. 389, 397 (D.S.D. 1974); see also *United States v. Valencia,* No. 75-1342 (6th Cir. 9/6/76); and *United States v. McCord,* 509 F.2d 334, 349 (D.C. Cir. 1974) where the Court stated "we have no doubt that McCord's most general assertion of principle is grounded in respectable authority; *i.e.,* serious prosecutorial misconduct may so pollute a criminal prosecution as to require dismissal of the indictment or a new trial, without regard to prejudice to the accused."

The conclusion of *McNabb* argues that:

> "a decent regard for the duty of courts as agencies of justice and custodians of liberty forbids that men should be convicted upon evidence secured under the circumstances revealed here. . . . The history of liberty has largely been the history of observance of procedural safeguards. And the effective administration of criminal justice hardly requires disregard of fair procedures imposed by law." 318 U.S. at 347

We also refer the Court to Justice Frankfurter's statment in *McNabb, supra,* 318 U.S. at 343, that:

> "Zeal in tracking down crime is not in itself an assurance of soberness of judgment. Disinterestedness in law enforcement does not alone prevent disregard of cherished liberties. Experience has therefore counseled that safeguards must be provided against the dangers of the overzealous as well as the despotic."

Since Internal Revenue has ignored its own procedural safeguards, the setting up in Intelligence of a selected taxpayer out of a great metropolis for special attention, with no tax reason for doing so, leading inevitably to this prosecution, the Courts should intervene.

THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE FINDINGS AND JUDGMENT OF THE COURT.

This important issue is separated into sub headings for clarity.

Background

This case deals with the tax problems of a multifaceted man. By profession, he is an attorney. Pictures of his office in this record show it brimming with files, miscellaneous records and present a picture of seeming disarray. That picture, while testified by a government agent to as being a completely valid representation, is not urged on this Court as reflecting a confused mind. It is recognized that order can, and sometimes does, exist in patent chaos, and disorder in apparent system. It does, however, reflect a voluminous business, as do his gross legal business receipts. (See 1968 return reflecting just short of $300,000 in gross income). That the relationship of disparity of the particulars to the whole is a matter of immense importance in consideration of this type of case is beyond cavil. *United States v. Harper,* 7 Cir., 458 F.2d 891, 895.

Added to the legal business, he also operated solely-owned corporations, whose business was the manage-

ment of rental properties. These low-income living facilities generally operated at a loss. (Tr. 672-673, 681) Some stocks were obtained through loans against the security of the corporation operating the low-income housing,[5] and, through corporate resolution, the defendant was allowed to use such money to make stock investments on behalf of the corporations, when expedient, in his own name, which activity, authorized by corporate resolution, (Tr. 676-679) is sanctioned by Wisconsin law, so that the stock earnings could help off-set the losses incurred by operations of the rental properties. These stocks, plus his own, were of such volume that one employee worked on the records exclusively.

---

[5]The source of the moneys invested came from 2% government bonds, which belonged to the corporation, which were sold to re-invest for higher yield.

These multi-faceted activities are here briefly outlined to help the Court appreciate we are dealing with hundreds, if not thousands, of transactions having tax consequences, and the chance of error, as opposed to fraud, multiplies in direct relationship to that complexity, and account needs be taken thereof.

Mr. Eisenberg retained two separate firms of certified public accountants, one to prepare statements of the condition of the corporations and their proper tax accounting and returns, the other firm to check all stock transactions and all of the bookkeeper's system for the rest of the records. They were to work together and to assertain proper returns were made out.

> "Q. Did you ever have a conversation with Mr. Eisenberg in which he — in which you inquired of him as to why he had two accountants instead of just Burt Levine?

> "A. Yes.
>
> "Q. Do you remember what his response was?
>
> "A. Two heads are better than one." (Tr. 692)

Certainly, Mr. Eisenberg did everything possible to protect himself against these charges of felony, or even to avoid simple error.

The fact that the return was prepared by the CPA and to be co-signed by another person, certainly led defendant to believe that the return was true and correct.

Nowhere in all the testimony did defendant Eisenberg ever tell anyone that he believed the returns to be false. At all times did Defendant Eisenberg, CPA Levine, Defendant's wife and CPA Gillman, believe the returns were truthful and correct.

Defendant is being charged with *knowing* that the returns were not correct. This charge is patently false.

The fact is that the two building corporations had about $250,000 in low 2% bonds when the mortgages were FHA. Prospect Heights and Shoreland Manor Co. hold the bonds at a loss and bought higher paying dividend stocks so rents would not have to be raised, as suggested by both CPAs. The CPA Zerbel, who was never called to testify explained the purchases by the corporations to the IRS. There were gains, losses, but no fraud at all.

The IRS Beginning

The investigation of this case began prior to when Revenue Agent Kelly entered on the scene in February of 1969. Inheriting the case from a predecessor, Kelly, having to that time found nothing of consequence, was altered to the interest of the Intelligence

Division in May, 1970. In response to Intelligence inquiry, he demonstrated his alertness respecting a seeming want of relationship between cash expenditures and available cash and ruminated about his intended referral to intelligence on that account. A more diligent interest in the case to the extent of over 800 hours saw the evaporation of his initial theory.

Then came the inquiry into reported income of the defendant. This brought Intelligence out of the shadows, where it had been since late 1969, and into the open in the person of Special Agent Schwallbach. Schwallbach's investigation aborted, and no claim is even here made on account of unreported income, which was the basis of his original entry.

The concentration on this defendant, next inherited by Special Agent Uhbelholde directed itself to stock transactions and deductions with special emphasis on a certain Gisholt Stock transaction, a stock bought with the housing corporations' money. Gisholt is also no part of this lawsuit, except as it was brought into evidence for background without significant color.

From this evolved but five issues of consequence to support these three counts of false and fraudulent statements now before this Court on review.

In the complicated tax scheme of this country (for which even the Commissioner of Internal Revenue has now the grace to apologize, but of which the taxpayer has been poignantly aware all the time.) no taxpayer would, or could, survive the intense review without unearthing errors. In the complex business and professional activities of this defendant, seemingly significant errors were inevitable if viewed without perspective. We submit that these are not the deliberate false statements required by §7206.

Standard of Proof

As far back as 1943, in the noted *Spics* case (*Spics v. United States*, 317 U.S. 492), the Supreme Court rejected any contention that the mere failure to observe statutory directions to make full, complete and strictly accurate returns is an automatic violation of the criminal statutory scheme, which it might have been but for the insertion of "willfulness". The Court tried to elucidate on the type of activity that the term "willfullness" envisioned and suggested the more classic instances as proof of deliberate false statements, false entries, phony invoices, double sets of books, secret accounts, dealings in cash, destruction of records, testimony of bookkeepers who were given specific instructions by the taxpayer, testimony of accountants that records were deliberately withheld.

That proof, or proof of that dignity, is not found in this case, and the want of such proof bottomed the urging by the government that, even though it couldn't be shown, it should be inferred. But there can be no valid inferences without factual support, and that factual support is wanting here. Esteemed trial counsel stated the point most succinctly:

> "When a case has been investigated as long as this one has and none of the limitless categories of graphic fraud proof has emerged, it is because the taxpayer is innocent; it is because the investigators saw smoke but found no fire; it is because it was a civil not a criminal case." (Doc. 39, pp. 4-5)

The Accounting Method

The two main issues in this case are the interest deductions (Count I) and the "Cates" business expenses (all counts).

Mr. Eisenberg was using a hybrid form of accounting which was neither cash nor accrual, but a mixture of both. At the conclusion of each year all expenses were accrued, and checks dated December of the ending year written against them.

This system was testified to by Ethel Bolden, (Tr. 326-343) and it was bottomed on an effort toward paying all outstanding obligations at the year end. If there were sufficient funds for payment they were paid. If not sufficient funds, a check was written, dated year end, and held until there was money to pay the bill. With unusually large bills, such as "Cates", several checks were written with the intention of using the checks periodically rather than wiping out the entire balance by a single payment to one creditor. Thus the government contention that the written, but held, checks did not coincide were not directly reconcilable with invoices (Tr. 1093) is without substance and are a complete falsehood. Even after year-end bills were accrued if they related to expenses incurred in the presiding year. (Tr. 578, 579, 580, 583, 613)

This method had been followed for many, many years, and had never been criticized. (Tr. 578) Even Revenue Agent Kelly saw nothing untoward in the method for the years '65, '66 and '67. In fact when testifying to the occasion of Kelly's first meeting with Eisenberg on May 24, 1971, Kelly stated:

"Q. The occasion of that meeting, do you remember Mr. Eisenberg saying to you, "Say, Terry, if I made any mistake, please tell me about them?

"A. He might have. I don't recall that specifically, but he might have.

"Q. Okay." (Tr. 455)

The government's chief witness, Robert Ubbelohde, a Special Agent of the Internal Revenue Service, assigned to the Intelligence Division of the I.R.S. stated in an Affidavit dated December 8, 1975, notarized by one John A. Nelson, which Affidavit is marked "Exhibit 1" and attached to the Government's Response to Defendant's Motion for Judgment on Acquittal, in paragraph six of his Affidavit, as follows:

"6. That in your affiant's opinion the testimony of Mr. Heller (deceased) would not be vital to the defendant's defense as the method of accounting employed by the defendant's accountant has not been questioned."

There was no issue between the parties on the manner of accounting (Doc. 17, p. 10). Indeed, there could not be under the law. The law does not direct how to keep records. It merely admonishes the taxpayer not to change whatever method he adopts.

Sec. 446(a) of the Internal Revenue Code provides that a taxpayer may employ the method of accounting that he regularly used to compute income in keeping his books. Sec. 446(b) provides that the Commissioner may change such method if it does not clearly reflect income. Sec. 446(c) permits a combination of cash receipts and disbursements method and accrual method, which is the so-called hybrid method. The great volume of civil tax litigation on the subject of accounting

methods results in the oft repeated proposition that a taxpayer is not restricted to using any particular method of accounting. *Heaven Hill distilleries, Inc.* v. *U.S.*, 476 F. 2d 1327, 1335 (Court of Claims 1973). In cases where the Commissioner attempts to change the method of accounting, there is invariably a legitimate civil tax issue, albeit not even a fraud penalty.

In *Gilles v. U.S.*, 402 F.2d 501 (5th Cir. 1968), the court discusses the regulations and factors necessary for a taxpayer to accrue expenses for deductibility. The Internal Revenue Regulations, Sec. 1.461-1, provide that an expense is deductible when all events have occurred which determine the fact of the liability, and the amount thereof can be determined with reasonable accuracy. The Regulations point out that even if the exact amount of the liability has not been determined, it will not prevent the accrual so long as the amount can be computed with reasonable accuracy. The interest expense and legal expenses accrued by Mr. Eisenberg, constituting the major share of the items in question, clearly meet the test provided in the Regulations. The *Gilles* court goes on to discuss examples of accruals of expenses where various factors are not determined at the year-end. In conclusion, the court makes the pronouncement that is apposite to the Eisenberg returns, wherein the court states:

> "Since all accruals in income taxation need not be calibrated to finite absolutes, the judgement of the district court is affirmed in part and reversed in part."

In summary, the question of the hybrid method of accounting is not one for the serious instant criminal proceeding. If there is indeed a legitimate question as

to the validity of such a method employed by the taxpayer, the existence of such a legitimate question should suffice to remove the matter from any criminal involvement.

Moreover, having been adopted by the defendant over twenty years ago, he was prohibited from any alteration of his chosen system.

Revenue Regulation §1.446-1 (e) (2) (e), originating with TC 6282, approved December 19, 1957 and republished as TD 6500, November 9, 1969, stated:

> "Except as otherwise expressly provided in Chapter 1 of the Code and the regulations thereunder a taxpayer who changes the method of accounting employed in keeping his books shall, before computing his income upon such new method for purposes of taxation, secure the consent of the Commissioner. A change in the method of accounting includes a change in the over-all-method of accounting for gross income or deductions, or a change in the treatment of a material item. Consent must be secured whether or not a taxpayer regards the method from which he desires to change to be proper. Thus a taxpayer may not compute his taxable income under a method of accounting different that previously used by him unless such consent is secured."

The regulation was amended in 1971 (after the years here involved) and continues to read much the same.

Not only is there the impediment against changing accounting methods, but the method employed by the taxpayer must be used in this suit:

> "Proof of the latter fact [over or understatements] could only be accomplished by adopting and consistently applying the taxpayer's own method of

accounting, despite the fact that we are all agreed that the method, itself, is improper, or less reliable than some other method." *Morrison* v. *United States*, 4 Cir., 270 F.2d 1, 3-4.

The prosecutor and the Court below studiously avoided this mandate, and treated the defendant as on a cash basis (Tr. 1092-3, 1124) on the apparent basis that the government expert Ostrowski felt that no hybrid of cash and accrual was permitted under the authorities. Isn't that civil liability, if true?

Tax Issues

This case really devolves itself into but a few issues. The main ones are:

1. The interest deducted on obligations not in existence as of the date of the deductions.
2. The "Cates" transactions. This is the lawyer who represented defendant in his prolonged contest with the Wisconsin Bar Association, and the issue is the deductions taken on account of his claimed fees.

Of substantially lesser importance are:

3. The stock transactions.
4. The check to the State of Wisconsin for costs assessed by that State's Supreme Court.
5. The 1970 amended return.

We say these last three are of lesser importance because the Court below considered these as basically civil issues, when taken in isolation but as indicia of fraud in the context of the two prominent issues and with one another.

a. The Cates Transactions

This element runs through all the indictment years and is intimately related to the trauma experienced by

Mr. Eisenberg during those times. Richard Cates, an attorney, was retained by Mr. Eisenberg and his sons to represent him and his son, Alan, in a suspension case in fall of 1968, agreeing to work for $25 per hour plus expenses.

Cates defined the litigation as a horrible lawsuit, that the accusations against Eisenberg and his son were horrible, and the family was distraught. (Tr. 242) The witness detailed that it was a very oppressive set of circumstances causing grievous upset and frustration. (Tr. 246) It was time consuming, emotional and very energy consuming for Eisenberg. (Tr. 246) After the suspension by the Supreme Court, there was a direction that the name of the firm be changed, but Mrs. Eisenberg and the younger son Neal, both lawyers, came in which made the firm again Eisenberg and Eisenberg, and there was a great deal of beleagur-ing about that. (Tr. 254) The suspension was November 3, 1970. There is no question that Eisenberg appreciated the seriousness of the matter. (Tr. 259) It was in May that they got the favorable report from the referee clearing them completely and in November the reversal by the Wisconsin Supreme Court. The Milwaukee Journal actually gloated in an editorial, saying the Wisconsin Supreme Court did what had to be done. Why? When Dean Young heard all the testimony? When the unexpected reversal was handed down, the time needed to tidy up the affairs of the Eisenberg office just was not given by the Supreme Court. (Tr. 266) In the meantime there was some harassment by the Bar Association because of the failure to change the name of the firm and because Mr. Eisenberg, who

owned the building, continued to occupy his office handling his real estate interests. (Tr. 267)

The bills from Cates were accrued in the same manner as we described before. However, mistakes were made in the accrual, as follows in round numbers:

DEDUCTIONS	BILLINGS
$14,000	$ 8,500
$37,000	$39,000
$39,000	$22,000

The main evidence on these disparities came from Ethel Bolden. She testified that the bills from Cates came directly to her office. Sometimes "Margaret" would take them when she opened the bill and put them on Mr. Eisenberg's desk,[6] and then she would go hunting for them because she knew they came every month. Sometimes she found them there and sometimes Margaret gave them directly to the witness if she was there. When Margaret considered some charges were outrageous and she thought Mr. Eisenberg should see them, she would direct them to his attention but most of the time the witness didn't even think he looked at them.

Particularly she testified to the Count I differential as follows:

[Mr. Mitchell] "Q. I'm not a mathematician. Let's see if we know what total that was.

"I will tell you that it's been testified to that the total for those invoices for those three months totals $8,562.10.

[6]Margaret Fork testified she gave the Cates' bills to bookkeeping, or, if there were a lot of additional charges on them, to Mr. Eisenberg. (Tr. 345-346)

"Let me also tell you. Mrs. Bolden, that the 1968 tax return for Mr. Eisenberg, which has been admitted into evidence as Exhibit 1-4, shows a business expense deduction to Mr. Cates for the amount of $14,125.

"A. I could have actually overdone checks. I will admit that I'm not perfect. I could have been interrupted when I was doing them and just continued on and then when I got another bill the following month and figured that in.

"Q. So you want to take the responsibility for having claimed an additional $5,500.—"(Tr. 339)

While objection to this question was sustained, the prosecutor's inference was reasonable. It would seem the Cates mistakes are, thus, clearly disposed of. This poor woman, in doing her best, was just as infallible.

The "Cates" situation does differ in one detail from the other tax issues involved in this case. All the other deductions were reflective of true monies paid. Not Cates! Cates ultimately filed a lawsuit for payment and the case was settled for less than his accumulated vouchers reflected. Such a situation is not even innovative, much less fraudulent, in the accrual method taxing structure. The taxpayer simply picks up the difference between the accrued expenses and the settlement as income in the year of the settlement. This was done.

The evidence the Court found convincing on the issue of wilfulness in the Cates transactions was that it involved one of the most important matters in Mr. Eisenberg's life, that he had close contact with Cates, that he discussed the bills with him and that he signed the checks used to pay him. The Court commented

that "I couldn't see how he could avoid the inference of knowledge of what was going on and shift responsibility to others . . ." (Tr. 1142) The knowledge, however, that we are talking about is knowledge that specific sums of money were deducted from the tax returns in excess of invoices and/or payments. That would require knowledge of the outstanding balances for each year end, addition of the checks held, and a determination of where it would be most advantageous to deduct them. The facts referred to by the Court below would at most suggest that he was aware he owed Mr. Cates a lot of money and that he was paying him as he could under a system his bookkeepers had followed for thirty years. Once more the construction of these inferences not only ignores the only direct testimony in the case about how these mistakes occurred, but is in direct conflict with that testimony. How can the testimony of the bookkeeper who actually handled these transactions be absolutely ignored? Ethel Bolden testified that she was in complete charge of the law office account, that she received the Cates invoices, that she determined the number of checks to be issued, and that she tried as best she could to follow the system of vouchering expenses that their hectic over-worked office employed. She was the government's witness and she was specifically asked about her relationship to Mr. Eisenberg in this office:

"Q. And on whose instructions would you prepare checks?

"A. My own.

"Q. And how would you determine what amounts to make the checks out for?

"A. Well, if you are a bookkeeper, you usually know how to do your figuring, and Mr. Eisenberg

left it up to me. He never came in and asked me questions, so I just did what I would do in my own bookeeping. (Tr. 329-30)

"Q. Do you recall receiving monthly statements from an attorney Richard Cates?

"A. Yes, I do.

"Q. And did you prepare the checks to pay Mr. Cates?

"A. Yes.

"Q. And who would authorize you to prepare these checks?

"A. Nobody.

"Q. You did that on your own?

"A. Yes. I had complete charge of that office. I wasn't told by anyone what to do, when to pay a bill, and when — nobody told me not to pay a bill.

"Q. Did you ever prepare any checks for an amount larger than the invoices that you received from Mr. Cates?

"A. I tried not to.

"A. And —

"A. But sometimes you do make a mistake. I'm not perfect." (Tr. 330-31)

No Possible Intent

The specialized area on the question of intent evolves from a substantial number of cases wherein a taxpayer has placed reliance on the accountants and attorneys in connection with the preparation of his tax returns. This line of cases is significant where, as an initial premise, there exists a fact situation of the taxpayer placing the complete task of record keeping to his bookkeepers, plus providing full access of all

records to the certified public accountant for the preparation of his tax returns. The evidence in thise case is sufficient to conclude that the formula of the above elements has been met. The totality of the Eisenberg law practice operation and real estate management operation is such, as the huge payroll will most profoundly bear out, that Mr. Eisenberg, by necessity, trusted the record keeping processes to many of the employees. The testimony of the certified public accountant responsible for the preparation of both corporate and personal returns is equally undisputed that they were in possession of all the records necessary to properly fulfill their function. Their failure to account for all stock transactions in this case does not result in any culpability on the part of the taxpayer.

The case of *United States v. Pechenik*, 236 F. 2d 844 (3rd Cir., 1956) is remarkably similar to the present case. The government indicted Pechenik for three years on the theory that he wilfully understated his corporation's tax by treating capital expenditures as operating expenses. The Court of Appeals reversed a jury's verdict of guilty because the evidence did not support the verdict. In doing so it laid heavy emphasis of the testimony of the taxpayer's bookkeeeper and accountant as to the classification of invoices as capital items or expense items.

> "The defendant, notwithstanding the business experience attributed to him, left the books, bookkeeping and preparation of tax returns to the bookkeeper and the accountant. There is no dispute on the record between the bookkeeper and the accountant as to whether the accountant showed the bookkeeper how to go about his job. *There is no evidence that the defendant interfered with either of*

> *them or with the books. On the contrary, the invoices and payments were taken care of by the bookkeeper in the ordinary course of business and he made the decisions as to classification of expenditures according to his own best judgment.* The bookkeeper testified that the defendant did not give him directions to charge an expense to one item of account or another. The accountant prepared the corporation's tax returns from the books of the corporation, and defendant caused them to be filed. *He (the accountant) did not attribute the errors to the defendant or to any directions or information given by the defendant. His explanation was that he did not examine the invoices, but these were available. Nothing was concealed. No information was refused.*" (Our emphasis) (236 F.2d at 846-47)

In *Pechenik*, the government suggested "that it is incredible that the defendant did not know all along that capital expenditures were improperly treated." In response to this assertion, the Third Circuit said the following:

> "This suggestion, however, does not arise from the evidence, but rather from unwillingness to to believe that the evidence is true. Certainly the jury could accept or reject the testimony which exonerated the defendant of evil intent. But disbelief does not supply proof that the defendant participated in, directed or knew the books were kept incorrectly.
>
> * * *
>
> "Here the direct evidence does not establish a wilfulness, knowledge of falseness and intent to evade taxes on the part of the defendant. Moreover, nowhere does the evidence disclose the positive type of conduct on the part of the defendant indicated by the Supreme Court in *Spics v. United States*, supra, as necessary to the felony specified by Section 145(b), Speculation and intuition cannot be substituted for proof." (236 F.2d at 847)

We respectfully submit on the Cates transactions the direct evidence not only does not sustain the government's burden in this case but in fact exonerates the defendant. Loose inferences cannot be drawn from neutral facts to strangle direct evidence.

This Court in *United States v. Lisowski,* 504 F.2d 1268 at 1272 expressed complete approval of *Pechenik,* but distinguished on other bases, none of which are found here. *Lisowski* was a scrap dealer who accepted private cash payments from buyers; his records reflected only check payments. In the instant case, we have no unreported income, nor do we have failure to reveal to his bookkeeper or accountants. The worst said about the failure to reveal is:

> "Q. Did you ever ask for brokerage statements from Mr. Eisenberg's office and have it — have them refuse to give them to you?
>
> "A. I have never really been refused anything." (Tr. 690)

To show the distinction, and the complete applicability of *Pechenik,* we quote from this court in *Lisowski*:

> "In the present case, Lisowski, unlike Pechenik, did not supply his bookkeeper or his accountant with any facts concerning this particular income of the company and himself, but instead handled the transactions relating to this income in what can only be termed a clandestine manner. '[A] taxpayer cannot shift the responsibility for admitted deficiencies to the accountants who prepared his returns *if the taxpayer withholds vital information from his accountants, or takes positive action designed to mislead them.*" (504 F.2d at 1272, our emphasis)
> This case is directly within *Pechenik.*

The Cates Conviction Should Be Based On Evidence, Not Fantasy

Notwithstanding what the record shows in regard to receiving and maintaining the "Cates" account, the Court nonetheless found knowledge saying:

> "There was evidence that the statements were put on his desk. He personally signed the checks." (Tr. 1142).

These isolated events, exterpolated from a contradictory record, principally what purports to sustain this guilty finding.

It is bolstered by a companion finding as follows:

> " . . . it seemed to me that this was one of the most important matters that Mr. Eisenberg had, personal matter to him, close personal contact with Mr. Cates. They had discussions about the billing." (Tr. 1142).

The discussion between Defendant and Cates are covered in the transcript on page 224 to 225 as follows:

> "A. We tried the first five weeks in a small courtroom and we tried the second four weeks in a larger courtroom; and my recollection of when I was in need of money and talking to Sydney clearest is in the large courtroom which was in the later summer, August. I was asking Sydney for — if he could make more substantial payments. That's really what I was asking.
>
> "Q. Did this conversation occur in and around the court area or was it at some other place?
>
> "A. That's where I saw Sydney. I would meet him there in the morning, I would go to lunch. We'd come back at noon and we'd be together and we would generally speak at the end of each court session and about the tactics or who the next witnesses were, etc. Then I'd go work in the evening.

But it was in the courtroom area and I have recollections of speaking to Sydney about the bill.

"Q. Now, what is your recollection as to the responses you received from Mr. Eisenberg during the course of those solicitations?

"A. Any time we spoke about the bill, Sydney would speak about the problems he was having and that — you know, he — I was aware of those problems and I guess that's my recollection. He certainly honored what I was saying I think in some instances it would have results but my request sometimes would be diluted in the stress and anxiety that he was under and his inability to earn a living and the injustice of the situation he was in and it was a very difficult piece of litigation; and when I say I at one point talked about leaving, I guess I never want anything so much in my life I knew I couldn't have. I would have to defend Sydney whether I got a nickle or not. That was — Sydney was very receptive and decent."

The discussions concerning the bills issued during the three year period obviously took place in the courtroom and simply consisted of Cates asking Defendant if he could make more substantial payments. "That is really what I was asking." No bill was shown or handed to the Defendant, no payments were discussed. No credits or balance was even mentioned. Neither one knew of the balance, only their bookkeepers would have known. Each bookkeeper was apparently in charge. All either one knew was obviously a balance.

One further conversation — long after the indictment period — is substantially of the same tenor, as well as being time-wise out of consideration. (Tr. 236)

It is obvious that the Cates' conversations with the Defendant were limited to the tremendous efforts on

the part of Cates and the Eisenbergs and because of Cates' belief in the decency of the Defendant, witness Cates never went over the bill itself but only mentioned the fact that he needed money. Cates couldn't possibly know the extent of the bill. The case was Cates' office project, and his office manager was sending out the bill (Tr. 275-278). Ethel Bolden was the bookkeeper receiving the bills and paying same. Bookkeeper Ethel Bolden was doing her best to send whatever money was available to Mr. Cates. She obviously had to control the bill payments.

The lower court's bases for finding wilfulness are nonexistent.

b. The Interest

This issue proceeded from the fact that in 1968 interest was included on a loan that did not arise until 1969. This issue was dominant in the esteem of the government and apparently the Court. This concerned notes that came into existence in January and March, 1969, and represented an interest deduction of roughly $14,000 taken in 1968. That it was a loan renewal was given short shrift. That the interest was a valid and real pay-out is not questioned. Obviously the renewal called by interest payable in advance, a prepayment in a time of the money shortage, nothing illegal.

Perhaps the government should make us pay our taxes on December 31. *Perhaps* giving us a third of a year is too much a margin for human error to be subjectively equated with fraud. *Perhaps* it would be better to recognize Count I is outlawed by time and forget this issue, on which there is a dearth of evidence, but the fact is that a real deduction was taken in the wrong year, with no tax benefit to supply

motive, which might in turn supply a basis for the essential element of wilfullness. The only reference in the record to anything besides pure book entry is:

> "[Mr. Kelly] A. Well, yeah. He did, he stated that, that when he was dealing with these banks that sometimes he would negotiate refinancing of loans. And that he would do this over the phone and that they would reach some sort of an agreement or accord over the phone. And then based upon that conversation or that oral agreement that he would instruct the bank keeper [sic] or whoever issued the checks to issue a check to that particular bank in payment of the interest." (Tr. 428)

It should be a matter of common knowledge that when bank loans are refinanced, prepayment of interest may be bargained for and paid or anticipated.

The argument of the prosecutor on this issue is interesting in its invitation to the Court to speculate where no evidence existed.

> "Mr. Bukey: Yes. That's beyond dispute, but that doesn't affect, I suggest, the intention. The reason for that, I would suggest, is how can one reasonably determine what the interest is — first of all, how can one determine that, in fact, one is going to — successfully going to be able to refinance notes. There is no evidence that Mr. Eisenberg had successfully refinanced the notes, at the Bank of Lincolnwood or the note at the Devon Bank at the time he took — and December 31, 1968. There is equally no evidence that one can know with certainty prior to the note coming into existence what the interest is going to be. You don't know the due date; you don't know the amount of interest; you don't know how that interest is going to be applied; you don't even know whether the note will clear. It's speculation. And to then turn around

> and represent that you have a check dated December 31, 1968, and that the banks must have held the checks is beyond belief, I suggest, and we know when the check was actually received by the bank and when it cleared banking channels, and that was not until March.
>
> "So that assertion, while, of course, the loans, were, in some instances, refinancing of other notes doesn't allow him — or I would suggest doesn't support the inference that a specific check for twenty thousand and some odd dollars could in any way have been predetermined prior to the payment of the check." (Tr. 1107-1108)

If that argument is true, it seems the government overlooked an essential witness, the banker. But the only evidence in the record, Mr. Kelly's statement quoted above, leads inevitably to the opposite conclusion — or inference.

c. The Stock Transactions

This concerns the sale of three stocks. Hercules Galion, Bankers Dispatch and Allstar Insurance. The government disputes the cost basis used in calculating the loss on Allstar Insurance. On the other two stocks there is a dispute as to who owns them, Shoreland Manor or Prospect Heights or Sydney Eisenberg. The Allstar and Hercules Galion sales were prior to 1968.

Revenue Agent Kelly audited Mr. Eisenberg for two years. The Intelligence Division has investigated the returns for four years. These five issues of rollover deductions and three stock transactions are all that there is left of their work. At this point they have left untouched hundreds of thousands or millions of dollars worth of other business, corporate and personal expenses. The government disputed only Mr. Eisen-

berg's handling of three stock transactions. Mr. Eisenberg has owned over 700 different issues of stock. His returns for these years contain over nine pages that list nothing but dividend income and capital transactions from the stocks. No one disputes the treatment of any of those other stocks during the indictment years, only the three stocks. The proof has shown Eisenberg had not one but two CPA's who worked simultaneously for him during these years. He had dozens of bookkeepers. The complexity against which these issues developed include the absence of Mr. Eisenberg's direct knowledge or participation in the recordkeeping or tax treatment of anything, the confusion between the accountants, the coming and going of bookkeepers, and the thousands of transactions handled.

The handling of this mass of stock transactions should be taken into account as testified to by Irene Wieczorek. In 1966, she was assigned to handle the stock transactions exclusively. She found the records a complete muddle, and on her own, established a card index system, deriving her information from 1099's and broker's confirmations. In less detail than the indices, she maintained a ledger.

This system of her making proved eminently efficient as can be readily seen from the comparatively few errors gleaned after this exhaustive Internal Revenue inquiry, these 3 (out of 700) stock transactions.

1. The All Star Insurance matter. The difference between the parties is that this should have been a $7,000 gain instead of a $7,000 loss on the '69 return, because the basis had been substantially used up on a loss reported on the 1964 return.

It was Mr. Levine, a CPA, who testified he calculated the basis of the stock on the information he received from Irene Wieczorek, who started revision of the records in 1966. Both she and Levine calculated the basis to the best of their abilities. The remarks of the Court in its finding of guilty are telling:

> "The capital gains problem this year I thought was weaker, too. This was just a matter of the basis. Standing alone, I think that would strictly be a civil adjustment. There were some computations made and one thing and another. But it can't be viewed alone, I don't believe, in this overall three-year picture, so I find the defendant guilty as to Count 2." (Tr. 1143-4)

With that clear statement and the only other matter of substance during that year being the continuing "Cates" matter, where the deduction was $2,000 *less* than the billing, it is inconceivable how the Court reached its conclusion, in giving full recognition of the presumption of innocence, reasonable doubt and individual consideration of the charges.

But more important to this action, neither, under the evidence, discussed this basis with Mr. Eisenberg, nor did he have any remote connection with these calculations. The prosecutor's remarks relative to this transaction are revealing:

> "What would be the purpose of a transaction of that sort if it is not to minimize tax liability? Now, we're not saying that an adjustment is appropriate as a result of that transaction some 12 years ago." (Tr. 1121, 1. 18-21)

The prosecutor felt however that the other transactions should form a kind of over-lay to bring this item into the criminal scope. (Tr. 1121-2). It would

seem such an over-lay would necessarily include the scope of the returns we deal with here, if fairness is a quotient.

2. The Hercules Galion Stock. On these transactions we enter into the shadowy area of the wash sale. Mr. Eisenberg sold 2,000 shares in December, 1967, a year prior to the indictment years, and on the same day Shoreland Manor (a wholly owned corporation of Eisenberg) bought 2,000 shares. This was done on Levine's advise that it was proper.

The "shock" expressed by one agent of the government at such advise (Tr. 865), would seem immaterial when experienced eight years later and in the context of this criminal case. It is particularly immaterial when it had a negative impact on the sensibilities of another agent:

> "Q. Well, you heard Mr. Levine testify that Mr. Eisenberg said something to the effect, I got a stock loss and how can I take advantage of it and maybe I can sell it and buy it. And Levine says no, don't. You can sell it and have your corporation buy it. Now, do you see anything Machiavellian about this conversation?
>
> "A. No, sir, I do not." (Tr. 1020)

On August 7, 1968, the 2,000 shares were transferred back to Eisenberg and later in October, 800 shares were transferred to Eisenberg's brokerage account, of which 783 shares were sold in Eisenberg's name.

Either Mr. Levine or the bookkeeper determined this was part of the 2,000 shares held by Shoreland, adjusted the records, and thus it was declared.

Understandable, of course! But more important, there is no evidence of any communication to Mr. Eisenberg of how his employees contemplated and resolved this complicated transaction. (Tr. 879-880) See *United States v. Mousley*, E.D. Pa., 201 F.Supp. 510 where the Court said at p. 512:

> **"Fourth as to Count II of the indictment, which charged the defendants with atempting to evade the payment of taxes by filing a false application for discharge of property from a Federal Tax Lien, defendants contend that although the Government produced evidence showing that the date of the agreement of sale of such property had been altered, no evidence was produced to link the defendants with such alteration. Our recollection of the evidence agrees with defendants in this regard. Therefore, we shall direct a judgment of acquittal as to Count II for both defendants."**

3. The Bankers Utility Stock. This stock was sold in brokerage accounts of Shoreland Manor. (Tr. 868) If the corporate accountant, Gillman, had looked at the brokerage account, he would have seen it. He simply did not look! He testified he relied solely on the ledger (Tr. 624-625) (unlike Levine, who reviewed all brokerage statements feeling it was accountants work, and not bookkeeper's obligation. (Tr. 595-599)). Though Gillman testified he was dissatisfied with the way the ledger was kept, he did not go behind it. It is, of course, a little late in the day to chastise an accountant for adopting bookkeeper's work, which he even then found patently unsatisfactory, only on the basis that "the detective work to sort out what is in there could be very difficult."

But the important issue is whether Mr. Eisenberg is an insurer of the competence of a lazy accountant. Maybe Lloyd's, but not Eisenberg!

But even aside from that, what motive? Reported, as it was, on Shoreland's corporate return, in a year when Shoreland reported an unexpected gain, it was a disadvantage tax-wise not reporting it on Mr. Eisenberg's return, as the contention is it should have been. There obviously was no motive and there was no intention whatsoever.

d. State of Wisconsin

The State of Wisconsin issue is one that most clearly illustrates the hybrid cash-accrual accounting method that Mr. Eisenberg used over some thirty-odd years, and about which there was no dispute. (Doc. 17, p.10)

Mr. Eisenberg, and his, son, were involved in the lengthy disciplinary proceeding of which we've spoken. When the Supreme Court upset the fact-finding Referee and ordered the year suspension, it also assessed costs of $20,559. This was in November of 1970. As an accrued obligation, the bookkeeper deducted this assessment as a business expense in his return for the calendar year 1970, even though it was paid out actually in 1971.

It was deducted in accordance with his hybrid method of accounting, and it was actually paid in coin of the realm to the State of Wisconsin.

The testimony of Revenue Agent Ostrowski is illuminating:

> "Q. Now, would you tell the Court what affect the claiming of the $20,000 as an expense paid to

> the State of Wisconsin in the year nineteen hundred and seventy has on that return?
>
> "A. It has, in effect, no tax impact.
>
> "Q. And is that the type of a deduct that can be carried forward or backward to the tax payer's tax advantage?
>
> "A. Negative taxable income can only be carried backward or forward if it's a net operating loss. And this one is not a net operating loss.
>
> "Q. This is a deduction that could not be carried forward or backward?
>
> "A. That's correct." (Tr. 1017)

Where, there, do we even find an issue, and particularly a criminal issue?

This again, the Court in its findings gave imperfect consideration, relying as the Court did on mere overlay.

> "The Wisconsin expense, I think that would have been a civil adjustment standing alone, considering the nature of his vouchering system. Even though it was paid the following year by a check made out for the year 1970 but not issued until after his tax return was filed, I think that might have been a civil adjustment, but fitting into this whole picture, I don't see how it can be." (Tr. 1144)

What the lower Court has done here, we respectfully submit, is accept the proof that certain transactions, such as the stocks, the State of Wisconsin check, the interest deductions, and the Cates transactions, affected the tax computation and assume that because they did, it must have been by willful, evil design. By that imaginary process, civil issues can be proof that it was taxpayer who manipulated the results, that he had knowledge of the handling of the

transactions, and that he either accomplished the result or ordered it to be accomplished. In the instant case the taxpayer would have gained financially by following the IRS version of bookkeeping; there could be no motive or intention.

e. The 1970 Amended Return

It would unduly prolong this brief to argufy why filing an amended return is some type of admission of fraud in the first return. We submit we may reasonably leave it to the government for justification. We do not find it in the findings of the Court.

> "And we had the amended return, but under the circumstances, that amended return, I don't think it cured the problems." (Tr. 1144)

The evidence reflects that, resulting from a change in bookkeeping staff employees, there were inadvertently included in the checks written and dated December 31, 1970, certain disbursements aggregating $58,545.00 which were expenses of the calendar year 1971, and therefore improperly charged to 1970 operations. The accountant making the review at December 31, 1970, did not catch this error until he was doing the year end review and preparing the income tax returns for the calendar year 1971, which work he completed in the fall of 1972. He properly reclassified these deductions in preparing the 1971 income tax returns, and thereafter filed an amended return for the calendar year 1970, from which he excluded these deductions. Even the government contends something less than $5,400. (Tr. 603) This was purely an error on behalf of the accounting employees and, in connection with evaluating this matter, it is to be noted that the taxpayer got no substantial benefit from such

error, inasmuch as the greater portion of adjustment reflecting this error resulted in disallowed personal deductions and a loss on the original return for the calendar year 1970, for which there was no tax benefit.

The government's own evidence on this point clearly establishes that in computing the accounts payable at the end of 1970, the taxpayer's bookkeeper continued to accrue, as accounts payable, salaries and wages and interest expense and miscellaneous other items that were accrued, incurred and paid in 1971 rather than in 1970. Accountant Levine's testimony is very clear that he did not discover the error in the 1970 accounts payable until he was preparing the 1971 return. The evidence is crystal clear that the correction of the error and the filing of the amended return was solely attributable to a failure of responsibilities of those employed by the taxpayer in good faith to handle such matters and defendant had absolutely nothing to do with the errors in any shape, form or manner.

The focus of the government seems to be on the tax benefit relationship of the deductions to the 1971 return disregards the requirement that the offense alleged is predicated upon the taxpayer's state of mind at the time his 1970 return was filed. Certainly, no one can dispute that the taxpayer would have no knowledge, even if he knew that he claimed 1971 deductions in 1970, that the deductions would be of more tax benefit in 1970 than they would in 1971.

In the light of the record, moreover, the contention that the 1970 reporting was a fraud is just insane.

> "Q. Can you tell me looking at the 1970 return — did you testify in regard to the 1970 return that he had a $30,000 negative figure?

"A. Right.

"Q. Could you find that figure?

"A. It's not down here, but it's this 38,000 less the 69,000. It's where I have zero, it's actually minus 30,000.

"Q. Adjusted gross income of 38,000 and itemized expenses of $69,000?

"A. Right.

"Q. And that $30,000 negative figure on the tax return; is it not?

"A. Essentially, yes.

"Q. Can you carry forward itemized losses on a personal tax return?

"A. No.

"Q. Can you carry them back?

"A. No.

"Q. When Mr. Eisenberg filed this return, wasn't he, in effect, losing $30,000 worth of deductions?

"A. Yes.

"Q. And you wouldn't consider that as a tax advantage, would you?

"A. No" (Tr. 809-810)

THE COURT USED AN ERRONEOUS STANDARD OF PROOF

Illustrative of the value of the evidence on Motion for Judgment of Acquittal at the close of the Government's case were the remarks of the fact-finder:

"I think we realize at this stage of the proceedings this Court is required to consider the evidence along with all reasonable inferences that may be drawn therefrom in the light most favorable to the

government. But I in denying the motion, I do not intend to indicate that I don't see weaknesses in this case as have been very amply brought out on cross examination and in argument. I'm not overwhelmed with the Government's efforts or their evidence, but I think at this stage of the proceeding they have made out a prima facie case in varying degrees, it seems to me, on all counts. So the motion will be denied as to all counts. I don't consider this an open and shut case, gentlemen, by any means." (Tr. 1133)

Yet, on rendering his decision, no consideration of mitigation was evident (Tr. 1139-1145), neither factual relationship to gain, nor to the whole of the complicated picture. Nor to the absence of direct knowledge, despite the language of *Pechenik*. The government witness most helpful to the defendant was Ethel Bolden. It was not until his ruling on the misnomered "Motion for Acquittal After Verdict" that disbelief of that witness became evident:

"Defendant emphasizes the importance of Ethel Bolden's testimony which allegedly demonstrates that defendant had nothing to do with the review of invoices, the calculations of how many checks to issue, or the timing of their issue. Defendant cites *United States v. Pechenick*, 236 F. 2d 844, (3rd Cir., 1956) and asserts that defendant's guilt can be sustained only if Bolden's testimony is not believed.

"A finding of guilty cannot be predicated solely on disbelief of a witness's testimony. *United States v. Pechenick*, supra; *United States v. Scher*, 476 F.2d at 321-2. The determination of guilt in the present case, however, was properly based on circumstantial evidence of defendant's bad faith or evil intent. As the court indicated in *Scher*, where evidence from which guilt can be inferred is present,

disbelief of a witness is not irrelevent to a finding of guilt:

> . . . 'the carriage, behavior, bearing, manner and appearance of a witness — in short, his "demeanor" — is a part of the evidence. . . . [W]e have again and again declared, and have rested our affirmance of findings of fact of a judge, or of a jury, on the hypothesis that this part of the evidence may have turned the scale. Moreover, such evidence may satisfy the tribunal, not only that the witness' testimony is not true, but that the truth is the opposite of his story. . . .' *Dyer v. MacDougall,* 201 F.2d 265, 268-269 (2nd Cir. (1952) (footnote omitted). 476 F.2d at 322. (Doc. 41, p. 11)

Disbelief of a witness' testimony to raise proof of the opposite certainly is not proof beyond reasonable doubt in a criminal case. *United States v. Miller,* 277 F. Supp. 200, 204:

> ". . . the disbelief of the statement would provide no basis for concluding that the opposite is true. See Dyer v. MacDougall, 201 F.2d 265 (2nd Cir. 1952). As Chief Judge Aldrich observed in Janigan v. Taylor, 344 F.2d 781, 784-785 (1st Cir., 1965), '[w]ere the rule otherwise a case could be made for any proposition in the world by the simple process of calling one's adversary and arguing to the jury that he was not to be believed' " *277 F. Supp. at 204.*

The concept of the government bringing as a witness to prove the opposite of what he or she says is abhorrent to any system of criminal justice. See *C.I.R. v. Welch,* 5 Cir. 345 F.2d 939. On the contrary, unimpeached positive testimony cannot be disregarded. *Browning v. Crouse,* 10 Cir., 356 F.2d 178.

The whole wrongful standard only aggravates the refusal to open proofs (Rule 29) to allow Ethel Bolden

to explain how her mistakes in calculation could have arisen. (Doc. 41, 46) How, indeed, can newly discovered evidence be cumulative of a Court's disbelief?

V.

THE LOWER COURT ERRED IN FINDING THE MOTION FOR NEW TRIAL UNTIMELY, AND THE GROUNDS THEREFORE MERELY CUMULATIVE

On June 29, 1976, after making its initial guilty finding, the Court below granted twenty days to file post motions, "or such other time as you might desire to file these motions." (Tr. 1146, 1161).

On July 16, 1976, (seventeen days afterward, and within the twenty day period), the defendant filed a Motion requesting another fifteen, or a total of thirty-five days to file "post trial motions" (Doc. 37). This motion was granted July 19 (Doc. 38), the twentieth day.

In the Post Trial Motion filed asking acquittal, the defendant also asked for a new trial on the basis of newly discovered evidence. This portion of the Motion the Court considered as a Rule 33 Motion, and, in ruling thereon, stated:

> "If a motion for a new trial based upon newly discovered evidence is made within seven days after verdict or a finding of guilty, it is to be granted when in the interest of justice. Wright, *Federal Practice & Procedure,* §557. If a motion for a new trial is not made within this seven-day time period, a new trial is warranted only if the newly discovered evidence discloses; (1) that the evidence is newly discovered and was unknown to the defendant at the time of trial; (2) that the evidence is material, not merely cumulative or impeaching; (3) that it will probably produce an acquittal; and (4) that failure to learn of the evidence was due to no

lack of diligence on the part of the defendant. Wright, *Federal Practice & Procedure*, §557.

"Since the newly discovered evidence in the case at bar was not presented to the court within seven days of this court's judgment of guilty, the more stringent standards of the four-part test must be applied.

"This Court accepts defendant's representations that the evidence is newly discovered. In addition, because of the high quality of defendant's counsel, this court is certain that failure to learn of the evidence at an earlier point was not due to the lack of diligence on the part of the defendant.

"This court believes, however, that the evidence is merely cumulative in nature. Ethel Bolden admitted at trial that she could have made mistakes in calculating the Cates invoices. (Tr. 33, 339). The evidence which defendant seeks to admit offers one possible explanation for how a mistake in calculating the 1968 invoices from Cates could have been made by Ethel Bolden. This evidence must be regarded as being both highly speculative and cumulative. In addition, such evidence does not persuade this court that an acquittal is warranted." (Doc. 41, pp. 15, 16)

We respectfully submit the Court erred in considering the motion under the more stringent standard. This portion of the motion, considered as one for new trial was timely filed:

> "The court on motion of a defendant may grant a new trial to him if required in the interest of justice. If trial was by the court without a jury the court on motion of the defendant for a new trial may vacate the judgment if entered, take additional testimony and direct the entry of new judgment, * * * A motion for a new trial based on any other grounds shall be made within 7 days after verdict or finding of guilty or with in such further time as the court may fix during the 7-day period." *(Rule 33, Federal Rules of Criminal Procedure)*

This motion was clearly made within the letter and spirit of the Rule, and the defendant was entitled to consideration under the more beneficent standard.

On the face of the government's brief to the Court of Appeals its discussion of *Mende v. United States*, 9 Cir., 282 F.2d 881, clearly demonstrates a duplicitous indictment and therefore obviously a defective one under the Sixth Amendment to the Constitution of the United States. That *is* a defective indictment.

In *United States v. Charnay*, 9 Cir., 537 F.2d 341, we have exactly the situation to which Section 3288 was addressed. In that case on an adverse motion, the indictment was "found" not to state an offense against the United States. That finding was the law of the case, and fit securely within the provisions of the saving statute, 3288. Further the legal insufficiency was clear, the facts alleged in the *Charnay* case did not state a cause of action under the cited Code, and the cited Code was the only thing altered and eliminated. Sec. 537 F. 2d at page 354. What was changed or eliminated was not even part of the charge.

It is not "in spite of this authority" (P. 20, Government's Answer), but because of it that we contend Count One was barred by limitations.

In regard to the Government's footnote 2, a more careful reading would have demonstrated that we relied upon *United States v. Miller*, 5 Cir., 491 F.2d 638, to stand for the proposition that an infirmity of law and not one of fact was the standard relating to a motion to dismiss an indictment. We pointed to *United States*

v. Anderson, W.D. Ark., 254 F. Supp. 177 and *United States v. Marra*, 6 Cir., 481 F. 2d 1196 as demonstrating that the initial indictment filed in this case (later dismissed on government motion) was a good indictment. Neither the defendant nor we assume this court will be deluded by the government's facility in transposing argument.

In *United States v. Jones*, 6 Cir., 542 F.2d 661, the court did go outside the indictment in determining facts in a pretrial motion. However, this implementation of the Court's powers does not allow findings of fact not based on fact, and the Court's finding below that the first indictment was "legally insufficient" is simply not true. It was suficient, and *United States v. Anderson* W.D. Ark., 254 F. Supp. 177 and *United States v. Marra*, 6 Cir., 491 F.2d 638, demonstrate its sufficiency.

Title 18, U.S.C., Section 3288 did not serve to toll the statute. To attempt to do so is simply not fair to the Court, the Bar, the public.

II.

An approach to understanding the purpose of the government's theory of waiver, has left the defendant fairly bereft.

If ever an issue was raised by motion to dismiss, and, that failing, to suppress, and by exhaustive hearing all directed to selective and discriminatory prosecution, this record fairly presents the issue as well as trial counsel could ever have been expected to do.

But, the government raised an issue that we lay prosecutorial discretion, not at the feet of the prosecutor, but rather at the Internal Revenue Service, and

that we contend it was a matter of general knowledge that it was the service that dictated when prosecution should go forth, and not the United States Attorney himself. We consider that a truism beyond contradiction, and we don't believe that the government would even contest on that account. It apparently does, however, securing to itself a clinical definition of prerogatives set out by the statute or regulation, that simply does not reflect the truth of the situation, as will be clearly demonstrated in the next ensuing subsection.

Rather than admit or disavow this fact, the government argues that the assumed prerogative of the Internal Revenue Service was not articulated below. It does not contest the truth of the articulation, which we submit was tacitly assumed — certainly known — by all litigating counsel in the trial court. Since the government does not contest where discrimination in selectivity as to prosecution in tax cases is vested, we will not otherwise bother with this contention of waiver because to accept the contention of waiver would be to offend the legal pragmatist. Distinguishing between IRS and the government becomes an absurdity, when sad errors in judgment are not corrected. The worker or slave becomes the master.

(b)

This subsection continues the fallacy adverted to in subscetion (a). Attempting to confine discretion to the prosecutor alone and inquiry to *his* purpose, as opposed to the purposes of those who actually govern the prosecution, the argument is attempted to be augmented by the government in its reference to 28 U.S.C. §547(1). Because of the presence of that section, the

government argues that only the United States Attorney's purposes are of interest. The government, by this argument, could be allowing a forum that has long been desired. As we understand it, the purpose of that section was that a local person, inured to the mores of the community would be appropriate to prosecutorial discretion. That admirable theory has long since been abrogated. How else do we explain the presence of the Washington-based strike forces throughout the country. Practicalities are not effaced by citing statutes. Siberia is still Siberia; law enforcers must still be held accountable to the law, if we have learned anything in past years.

Contrary to the contentions of the government, it cannot be avoided that significance will be attached to the manner in which this defendant was pinpointed for "case development". "Case development" is not the manner by which defendant was selected by an audit, contrary to the contentions of the government (Answer Brief, p. 36). On the contrary his was one of three such matters assigned "specifically by the Chief". (Tr. 84) It is true as the government says that "defendant's case was selected for inquiry", but the continuation of their theory that "there is no evidence on the record that appellant and two other taxpayers alone were the subject of the Internal Revenue Service interests" is hardly illuminating on why defendant, was specifically assigned by the Chief.

The government argues that the evidence does not show that the Chief's decision to specifically investigate defendant was made on invidious or impermissible grounds. (Answer Brief, p. 37) The only applicable meaning of "invidious" so far as we are aware is an

offense occasioned by unfair discrimination. So far as this record discloses, the only content of the file specifically chosen as one of the three "case development" cases, defendant's, was publicity. That would seem to us both invidious and impermissible. In the vernacular of the public, it is plenty under all these circumstances.

Whatever the determination on that issue may be, it is unmistakable that defendant's case was in intelligence. It was not "transferred" there, but it was there and the statements of the Court in *United States v. Lockyer*, 10 Cir., 448 F.2d 417, on which the government most relies are peculiarly appropriate.

> "The better reasoned cases hold that a warning in accordance with Escobedo v. Illinois, 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977 and Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694, must be given to the taxpayer by either the revenue agent or the special intelligence agent at the inception of the first contact with the taxpayer following transfer of the case to the Intelligence Division. See United States v. Dickerson, 413 F.2d 1111 (7th Cir. 1969); United States v. Turzynski, 268 F. Supp. 847 (N.D. Ill. 1967) (Judge Will); and United States v. Wainwright, 284 F. Supp. 129 (D.Colo. 1968) (Chief Judge Arraj)." *448 F.2d at 422*

We submit that the record has shown a factual demonstration of "intentional purposeful discrimination," closely akin to what the majority of this Court deplored in *United States v. Falk*, 479 F.2d 616, 619.

Certainly the facts presented by this record are more lucid and compelling than those presented in *United States v. Fensterwald*, C.A.D.C., 553 F.2d 231, where the taxpayer sought to quash an Internal Reve-

nue summons on the ground that, because he was chief counsel for a committee investigating illegal activities by the Service, he *could* have been singled out for a special audit. Here he was a threat to evil intentioned and powerful forces in the community. The prosecution was relentless, the crimes charged were sheer bookkeeping questions; nothing stolen, hidden, deceptive, everything open for examination; intention of the U.S. was ruination of a decent person.

This defendant is not a person who might have been singled out. He was singled out, and in the absence of record definition of "case development", it means what it says. Develop a case!

Under this point, the government favors us at the inception (Answer p. 39) with platitudes having no reference to this specific case.

We do, however, argue with the government's answer. All of the below parenthetical material are the indicia referred to in *Spies*. Lifting from one of the Fifth Circuit's statements in *Windisch v. United States*, 5 Cir., 295 F.2d 535, that the clasic indicia of fraud need not be present (295 F.2d at p. 532) it is of note that that very case did have at least on of the classic indicia, (secret accounts in that specific items of income earned were omitted. Also in its next case, *United States v. Tolbert*, 7 Cir., 406 F.2d 81, the defendant withheld his books and records from the accountant (records deliberately withheld) who prepared his returns. In *United States v. Lisowski*, 7 Cir., 504 F.2d 1268, the taxpayer took the position that cash income was not reportable, (dealings in cash) so he paid taxes only on payments made to him by check. *Holland v. United States*, 348 U.S. 121, was a civil case (as we submit this is the most it could

have been) and which was a net worth case, revealed that the increase in net worth in the Holland Case could be accounted for by the failure to enter proceeds from the sales of property and surrender of gold into the books and records (secret accounts). In *United States v. Richard*, 8 Cir., 471 F.2d 105, there was a consistent pattern of understatement of income.

We painstakingly delineated the several elements of tax accounting on which the trial court relied in coming to its conclusion of guilt on all counts.

In direct contradiction of that form, the government disdains direct Answer, instead arguing its case in its Statement of Facts, which is a melange of generalities, confusion of issues, indifference to the law's dictates of separation of counts, and deliberate misstatements.

The government ignores that this is a three-count felony charge, and its approach of "take everything as as a whole," however petty, is completely irresponsible and an insult to the intelligence.

Thus it ignores that there is no law against backdating checks, when it speaks of "borrowing deductions or expenses." as to bring records to the proper time frame by a bookkeeper with years of experience. (Answer, p. 3) So long as the accrual system of accounting exists, what the government elects to call "borrowing" contemporaneously exists. The government now doesn't like the method of bookkeeping defendant used. Why didn't it say so before and follow the law on notice to the taxpayer? But the law only requires a true reflection of income, and it was never contended that defendant's books did not truly reflect income. If a particular bookkeeping system is to be mandated, we must look to the Congress.

The government's complaint is that the system did not reflect the actual time of payment. But it does not show the system, constantly employed was intentionally manipulated to reduce tax obligations. Nor could it. The trial court "bought" the government's condemnation of the defendant's "financial picture" (Ans., p. 3), and was thus led into an unfounded conclusion that

> "the vouchering system employed by defendant was not uniformly used or applied, and the misuse of that system bore too strong a relationship to the tax computation system and the computation of taxes."

This is an ignoring of reality. How does one compute taxes? There was just no way for the defendant to know the tax consequences in the succeeding year at the times the back-dated checks were paid. There was no basis for evaluation, much less the "strong relationship" of which the lower court speaks. Putting the back-dating in its very worst posture, defendant might have though he'd be helped tax-wise. He couldn't *know*. It was up to the CPAs to draw up the tax return. This they did and it is so conceded. What did Defendant do wrong. Nothing, absolutely nothing. While the government refers to adjustments on page 6, this does not relate back. Further, it is just such "adjustments" that occasion the existence of the Tax Court, and its consistent controversies. The very word "adjustment" signals civil, not criminal, differences. The truth was that the bookeepers had overpaid taxes, not underpaid. This is proof enough the governments case is completely unsound and vicious.

Just as there is no prohibition against back-dating checks absent an evil motive, there is none against wash sales.

These obvious omissions by the government in its Court of Appeals Statement of *Facts* make that argument worthless. But the worst of the omissions is the *total* delegation of these matters by the defendant to accountants and bookkeepers. All returns were prepared by CPA's, not Sydney M. Eisenberg, for all lawyers and the firm. Sydney M. Eisenberg is not a bookkeeper. He did no bookkeeping whatsoever.

The entire tax returns involved were made up by two tax Certified Public Accountants who had full access to all books of account and bookkeepers. Defendant did not make out any of the tax returns, nor keep any books. All records were in the hands of the bookkeepers and CPA's. Defendant never saw any of the books. They were analyzed and Defendant never knew of any difference of opinion, anywhere. All transactions were of record.

Records dealing with his business and interest expense deductions and stock transactions were kept by bookkeepers and brokers and stock records on *computer printouts*, and no way by Sydney M. Eisenberg. Any unused blank checks are still in the files.

At pp. 4 and 5 of the Answer, the government persists that the main witness to the Cates discrepancies should be disbelieved, and the opposite credited because that witness' predecessor "undercut" it. This refers to the witness, Angela Biro. Angela Biro was not an employee during the indictment years, and certainly not during the Cates transactions. This employee of but a few months never saw any Cates records or bills and could obviously not refute Ethel Bolden's testimony of her own complete responsibility for the errors made in reporting. Significantly while the government

is able to rationalize that defendant had some responsibility for the overdeducted expenses, especially the Cates deductions, on the basis of proof that contradicts the rationalization, it does not attempt rationalization of the under-deducting in 1969 (see our brief in chief, p. 31; Answer, p. 8).

The prosecutor persistently — if in an indirect manner — misleadingly attributes the accounting system to Eisenberg: " . . . Eisenberg's 'hybrid' accounting system in which accrued expenses supposedly were 'vouchered' at year-end . . ." (Answer, p. 5) is belied by the record. The only evidence is that this was not "Eisenberg's 'hybrid' accounting system." The government witness testified:

> "A. It was a system that was supposed to have been carried on for a period of maybee fifteen or more years. It was started by — as far as I know by the woman who was a bookkeeper back in the middle fifties when I first started working on the account. As the bills came in, she would voucher them out and record them and when they wanted to pay them they would pay the bill. As the cash came in, it was recorded when it came in as income and basically that was it." (Tr. 578)
> Is this proof of Eisenberg's system?

The government also points, in addition to the "borrowed expenses, to the stock notebook Mr. Eisenberg maintained calling it a "private notebook listing the exact status of his stock holdings" (Answer, p. 5). Actually the evidence was that the witness made changes in some notes from time to time, the changes consisting of "whether he had purchased stocks or sold stocks . . ." (Tr. 295), and nothing more. The description by the government transgresses the record,

aside from some sort of notebook not being any source from which the accounting firms composed the tax returns. Again, this statement is an absurdity where there were all the computer printouts from each and every stockbroker was readable to each CPA. If any stock purchases were entered into some notebooks and thrown away, we have the original printouts for examination from the broker. Why talk about anything just plain silly?

On the stocks (Answer, p. 7), there was no failure to report gain *on his personal return.* Those stocks were owned by the corporations, and purchased with corporate money. The problem with the government is that they rufse to recognize the record that, in accord with State law, he bought corporate stocks in his own name, for the benefit of the corporations. Notwithstanding a corporate resolution allowing this,[1] the government persists this is the defendant's income, notwithstanding that the record shows the two corporations sold the low interest bonds and produced an excess from a blanket mortgage refinancing for reinvestment.

---

[1] "A. It says 'Further be it resolved that Sydney M. Eisenberg be authorized to purchase common stock, bonds, debentures and/or other types of investments so as to offset the tremendous losses suffered by this corporation.' So the losses are referred to." (Tr. 677)

The problem here is that the government refuses to recognize the resolutions, and proceeds as though they don't exist. Although the CPAs showed the resolutions to Kelly while he was auditing the records.

Defendant followed the CPA suggested resolutions by furnishing through his own name an equal amount of stock as authorized. He bowed to the superior accounting training of his CPA.

Of the $7,000 item (Answer, p. 6), we think enough has already been said. (Brief-in-Chief, pp. 42-43) But it is clear from the record that losses, roll-over deductions, and items covering many items were also overlooked by the accountant, and more than equalled any possible gain. For example: $19,000 real estate taxes (Tr. 699); $8,500 fees (Tr. 699); and allowances $21,500. (Tr. 1012 etc.) This is certainly poignant evidence that this "astute" taxpayer fully relied on the persons to whom he delegated this work. (Tr. 610)

The foregoing is in response to the government's purposeful mixture of argument in its "Statement of Facts", which we can only believe was done to obscure rather than clarify, and, in that obfuscation, to invite affirmance. Now, we descend to the particular items on which this defendant stands convicted.

THE ACCOUNTING METHOD

The government's answer hereto is found at page 14 of its "Statement of Facts". It points to the testimony of its expert Ronald Ostrowski, and says he said that the method of accounting did not clearly reflect income and that it did not constitute the kind of hybrid or vouchering system generally recognized by the IRS; that the December dated checks were not allowable, and that is all. Yet the evidence shows the contrary: Here is the sworn testimony of CPA Levine.

> "Q. Can you handle an item on the cash basis during the first eleven months of the year and then accrue expenses at the end of the year?
>
> "A. Oh, sure. That's what I just said most of my accounts do.
>
> "Q. Are you saying that most of your accounts are similar to Mr. Eisenberg's system?

> "A. No. Some of them are strictly cash basis and some are strictly accrual basis and when they pick up the accrued expenses, they also pick up the accrued income. I will adjust the accounts receivable for them once a year.
>
> "Q. For both?
>
> "A. For both.
>
> "Q. And those items that you're picking up as accrued income or accrued expenses, it would make no difference what the date on the check would be for the payment of that accrued expense?" (Tr. 614)

Further that is not what the government's expert witness said. Where in the following does he say the system does not reflect income? He testified:

> "Q. With regard to the checks dated December 31, 1968, '69 and '70, what would their affect be on an accountant or auditor examining the books?
>
> "A. In reviewing any books of original entry, you are led to believe that the dates listed in those books and the amounts on the accounts are all properly correct. The assumption is always that the records do reflect what they do show.
>
> "Q. Did these books or original entry, SME office account,, accurately reflect what they claimed to be?
>
> "A. No, they do not," (Tr. 1008)

The government also points out that there was testimony that this defendant was extremely upset when his 1967 tax return (a year not involved in this case) was presented to him by his accountant showing he owed $2,000.00 A bill for $2,000.00 that was unexpected is usually a matter of some upset, but certainly not a reflection of wilfulness. The government omitted

that after checking, Eisenberg directed the $2,000.00 be paid, because the CPA said it was correct.

THE CATES TRANSACTIONS

The only distinction the government can point to on this element was the "false statement" made to the agent that he, Eisenberg, had never received any invoices from Mr. Cates. Mr. Eisenberg clearly never knew what the Cates balances were at anytime. Obviously he thought an invoice established a balance. Kelly knew this. There was no false statement because some payments were made before bills even came in. Of course, all reflections of out of court conversations are viewed with suspicion and evaluated with care, but the fact of the matter is that it was only when the additional charges were outrageous were the invoice bills brought to the defendant's attention. See the testimony of Ethel Bolden and Margaret Fork. (Tr. 345-346)

The "numerous discussions" between Cates and Eisenberg are fully set forth in the Brief-in-Chief with full record reference (pp. 37-39). This reply is needlessly lengthened by these recurrent government misstatements. Cates and Eisenberg only talked about paying bills. Not one balance or amounts of payments was ever discussed.

The Interest

The weakness of this element is amply demonstrated, to clearly show noncriminality, despite the tortured "Statement of Facts", in the governments brief in the Court of Appeals, we, like the government, refer to what the Court said, which is obviously the worst that can be said:

> "A general plan to refinance notes in the future does not excuse deducting interest in the wrong year" (Op. p. 13).
>
> A civil adjustment. No more!

Further, a civil adjustment based on a bookkeeper and accountant's error. Where is knowledge? Where is intent? The imputation to defendant of a prescience unheard of in mortal man to foresee the financial events of a coming year is what upholds this conviction.

The Stock Transactions

This section of the government's "Statement of Facts" is preponderated by a preoccupation with the sale of stock in the Gisholt Corporation. That transaction was not in any of the indictment years, and yet of the slightly over two pages of argument at least a page and a quarter is devoted to Gisholt. In this instance, which the government, of course, does not set forth in the most moderate terms, one corporation reported half of the gain. The other corporation did not.[2] This was a clear oversight occasioned by the accountant's omission. Perhaps that omission was occasioned in turn by the fact that one corporation reported on a calendar, and the other on a fiscal year. But here again we have the same situation. Matters were entrusted entirely to accountants and bookkeepers, and there is no evidence to the contrary, only innuendo.

[2]**The tax returns were highly involved and beyond a layman's comprehension. One corporate return was based on a calendar year, accrual method, one return on a fiscal year accrual method, other corporations on a calendar year accrual method and the personal return on a calendar year hybrid method. This Defendant had to rely completely on his two CPA accountants.**

In addition, the government treats a "wash sale" as though that, in itself, were the crime. As we said before, we know of nothing that outlaws "wash sales". Even the most uninitiated in stock transaction is familiar with the term.

The worst the government can say about the stock transactions is that Eisenberg "would sell stock at year end to obtain a loss, and then repurchase an identical number of shares in the name of another entity, circumstantially suggested the pattern whereby he could attempt to choose which manner of reporting was in the best financial interest." (Answer, p. 12) If the government is suggesting that this is some type of crime, it would be necessary to put a fence around the United States, to contain every taxpayer. On the contrary, every taxpayer is expected to report in the manner conducive to his best interests. Even the Supreme Court has recognized the propriety of such an intention, and in recognizing its propriety has certainly discounted its criminality:

> "The legal right of a taxpayer to decrease the amount of what otherwise would be his taxes, or altogether avoid them, by means which the law permits, cannot be doubted." *Gregory v. Helvering*, 293 U.S. 465, 469.

See also *Spies v. United States*, 317 U.S. 492, where the Court said at page 496:

> "Sanctions to insure payment of the tax are even more varied to meet the variety of causes of default. It is the right as well as the interest of the taxpayer to limit his admission of liability to the amount he actually owes. But the law is complicated, accounting treatment of various items raises problems of great complexity, and innocent errors

> are numerous, as appear from the number who make overpayments. It is not the purpose of the law to penalize frank difference of opinion or innocent errors made despite the exercise of reasonable care. Such errors are corrected by the assessment of the deficiency of tax and its collection with interest for the delay."

Significantly the government's argument ends up with "no evidence was brought forward to suggest why Eisenberg failed to report the gains from the sales of Hercules Galion and Bankers Utility stocks . . . " (Answer, p. 13). We submit that this positively reflects the attitude permeating this case. The prosecutor did not know then, and does not know now, that this was a trial of, and an appeal from, a *criminal* conviction. But it also demonstrates that the case was tried as a civil case, and on a civil standard guilt was found. Worse yet, the prosecution spent years of investigation absolutely refusing to tell Defendant of any mistakes that they claimed. This was done because they were only "nitpicking" to try to make out some type of income tax evasion case and when they realized Defendant never handled any money, a false return case.

THE 1970 AMENDED RETURN

While we have complained heretofore of the deliberate mistatements in the "Statement of Facts" sent to the Court of Appeals by the government under this item (Answer, p. 13-14), the government's emphasis is on the fact that Eisenberg "was enabled to state a taxable income for that year in a negative balance of some $32,000." As the record clearly shows, itemized losses on a persnal return cannot be carried back, and this was no tax advantage (Tr. 809-810). Why does the government omit such pertinent testimony? Why the tricky venomous inference?

And why does the government further omit that these were new accountants who filed the amended return?

The government says that our entire argument consists in a reliance that the court was obligated to believe the testimony of government witness Ethel Bolden. That is not true. Ethel Bolden was their witness. A fine honest woman. Of Ethel Bolden we said that if the Court did not believe her, it could not credit the opposite of her testimony, unfounded in proof. But why shouldn't the court believe her? She spoke the absolute truth. She was no longer in charge of the legal office. She was truthful and honest.

Further it is the undeviating testimony in this case that reliance was entirely put on seemingly adequate and competent accountants and bookkeepers and that is the thrust of the Pechenik decision, which fits hand and glove with this case. *United States v. Pechenik,* 3 Cir. 236 F. 2d 844.)

However, we did say that an incorrect standard of proof was used. We persist that the Judge erred in his opinion when he said that he was entitled to find the opposite of Ethel Bolden's (and the only) evidence. He didn't have the slightest reason to doubt her if he considered the operation of a large law and real estate ownership office. Anyone can be convicted of anything by simply disregarding prosecution evidence when unfavorable to the plaintiff.

CONCLUSION

The underlying thrust of this Petition for Certiorari is that there is no proof of criminal intent. The undeviating evidence is that of absence of proof of in-

tent, and in fact, positive evidence of the want of knowledge. There being no knowledge, there could not be the required criminal intent. No evidence was presented that showed the defendant directed or caused any bookkeeper or Certified Public Accountant to make an error in any way, circumstantial or otherwise, in fact the evidence is completely to the contrary.

Respectfully submitted,
SYDNEY M. EISENBERG,
Petitioner-Defendant

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

November 28, 1977

Before

Hon. WALTER J. CUMMINGS, Circuit Judge

Hon. ROBERT L. KUNZIG, Judge*

Hon. WILLIAM J. BAUER, Circuit Judge

On Petition for Rehearing

and Suggestion for Rehearing

En Banc.

(Title and Venue Omitted)

ORDER

On consideration of the petition for reharing and and suggestion for rehearing en banc filed in the above entitled cause by Defendant-Appellant Sydney M. Eisenberg, no judge in active service has requested a vote thereon,** and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

---

*The Hon. Robert L. Kunzig, Judge of the United States Court of Claims, is sitting by designation.

**The Hon. Harlington Wood, Jr., did not participate in any consideration of the petition for rehearing en banc in the above matter.

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

November 1, 1977

(Argued September 19, 1977)

Before

Hon. WALTER J. CUMMINGS, Circuit Judge

Hon. ROBERT L. KUNZIG, Judge*

Hon. WILLIAM J. BAUER, Circuit Judge

Appeal from the United States

District Court for the Eastern District of Wisconsin

No. 75 CR 136

Harlington Wood, Jr., Judge

(Title and Venue Omitted)

O R D E R

Sydney M. Eisenberg appeals from his conviction on three counts, of wilfully making and subscribing a false individual income tax return in violation of 26 U.S.C. § 7206(1). For the following reasons we affirm.

---

*The Hon. Robert L. Kunzig, Judge of the United States Court of Claims, is sitting by designation.

I.

Eisenberg's primary contention on appeal is that the evidence is insufficient to support the findings and

judgment of the trial court. More specifically, he argues that there is no evidence to establish that he knew that his income tax returns were false, and hence, no evidence to establish the requisite criminal intent. Emphasizing his reliance on bookkeepers and accountants in the preparation of his returns, he argues that the probative evidence leads in fact to the opposite conclusion, namely, that the incorrect returns were the result of employee errors of which he had no knowledge.

In this connection, the appellant points first to the testimony of his bookkeeper, Ethel Bolden, who claimed full responsibility for the overdeduction of payments to Cates, the attorney who represented Eisenberg in disciplinary proceedings before the Wisconsin State Bar. Similarly, the appellant cites the testimony of his accountants and argues that the erroneous treatment of capital gains from the sale of stock was solely the result of mistakes and oversights on their part. Finally, he insists that the various deductions taken in improper years (most notably the deducted interest expense) were understandable errors that could be attributed largely to his hybrid cash-accrual accounting method. But whatever the explanation for the deficiencies, Eisenberg argues, there is in none of these transactions any factual support for the conclusion that he had knowledge of the incorrect statements. The trial court's finding to the contrary, he suggests, was improperly based on its disbelief of Ethel Bolden's testimony, together with "loose inferences" drawn from "neutral facts."

Although the appellant is correct in stating that a criminal conviction cannot be predicated solely upon

disbelief of witnesses' testimony, *United States v. Pechenik*, 236 F.2d 844, 847 (3rd Cir. 1956), we cannot agree that the trial judge did not rely on any positive evidence. We note in this connection that the Government "need not aduce direct proof of intent. It may be inferred from the defendant's acts." *United States v. Spinelli*, 443 F.2d 2, 3 (9th Cir. 1971). And here, the trial judge relied on circumstantial evidence of the defendant's bad faith or evil intent as well as credibility determinations to reach the finding of guilt. See *United States v. Scher*, 476 F.2d 319 (7th Cir. 1973). Thus, in the case of the overdeducted payments to Cates — overdeductions that figured prominently in all three counts — the lower court based its findings of knowledge on evidence that Eisenberg had discussed the billing with Cates, that Cates' billing statements had been placed on Eisenberg's desk, and that Eisenberg had personally signed the checks. Similarly, the trial judge relied on evidence that Eisenberg had personally signed backdated checks to link him with the deduction of interest payments on obligations that were not in existence in the year of the deduction. More generally, while indicating that such items as the erroneous treatment of the stock transactions or the improper deduction of the payment to the State of Wisconsin could not alone establish wilfulness, the trial judge found in the appellant's financial activities over the entire indictment period a pattern of manipulation that bore "too strong a relationship to the tax computation period and computation of taxes themselves" (Tr. p. 1140). He thus refused to treat the failure to report capital gains and the repeated deductions in improper years as innocent or isolated mistakes.

To determine the sufficiency of the evidence, we must view that evidence and all reasonable inferences therefrom in the light most favorable to the government. *Glasser v. United States*, 315 U.S. 60, 80 (1942). Under this standard of review, we cannot agree that a rational trier of fact could not have found beyond a reasonable doubt that Eisenberg had violated 26 U.S.C. § 7206(1).

II.

The appellant also challenges the judgment of the lower court on several other grounds. He first argues that the indictment and conviction on Count I were barred by the six-year statute of limitations of 26 U.S.C. § 6531. Although the original indictment was returned before the six-year period had elapsed, the Government subsequently moved to dismiss the indictment because certain figures had been improperly designated as "gross income," rather than as "adjusted gross income." The trial judge granted the motion, dismissing the indictment as "technically defective," and a second indictment was returned nearly five months ofter the statute of limitations on Count I had expired. However, the lower court found that the saving provisions of 18 U.S.C. § 3288 extended the statute to cover the second indictment, and thus denied Eisenberg's pretrial motion to dismiss.

The appellant claims that § 3288 does not govern Count I because no "legal insufficiency" appeared on the face of the indictment. This argument is not persuasive, however, in view of the plain language of the statute, language that permits the dismissal of an indictment found to be "defective or insufficient for *any* cause" (emphasis added). Moreover, both the legis-

lative history and the judicial construction of § 3288 indicate that its central purpose it to safeguard the Government's interests in precisely this type of situation — that is, where the first indictment is dismissed for "technical reasons," and the continued running of the statute of limitations would permit the defendant to escape before a correction can be made. See *United States v. Porth*, 426 F.2d 519 (10th Cir. 1970); *United States v. Bair*, 221 F. Supp. 171 (E.D. Wis. 1963). We therefore conclude that the trial judge properly denied the appellant's motion to dismiss Count I as time-barred.

We are also unpersuaded by Eisenberg's claim of selective and discriminatory prosecution. The mere fact that newspaper clippings dealing with his discipliinary proceeding before the Wisconsin State Bar were contained in the Government's file does not alone suggest an invidious discrimination. See *United States v. Peskin*, 527 F.2d 71, 87 (7th Cir. 1975). Nor does the record reveal anything in the conduct of the IRS to indicate that an unjustifiable standard was employed in the decision to prosecute. We agree, then, with the lower court that the appellant has failed to overcome the presumption of a good faith prosecution by presenting "facts sufficient to raise a reasonable doubt about the prosecutor's purpose." *United States v. Falk*, 479 F.2d 616, 620-21 (7th Cir. 1973).

Finally, we find no basis for the appellant's claim that the lower court erred in denying the motion for a new trial based on newly discovered evidence. Because such evidence was not presented to the court within seven days of the finding of guilty, the trial judge properly applied a more stringent standard, *United*

States v. Brashier, 548 F.2d 1315, 1327 (9th Cir. 1976), and denied the motion on the ground that the evidence was "merely cumulative in nature" (Order, p. 16). On appeal, Eisenberg has made no argument to support the motion that this new evidence — mainly further testimony from Ethel Bolden — is anything other than cumulative. We thus find no justification for disturbing the trial court's ruling on this point.

Accordingly the judgment of the district court is AFFIRMED.

The trial court concluded testimony on Friday, left for Springfield, Illinois and returned Tuesday for sentencing June 29, 1976 at 4:00 P.M. At the said sentencing stated: "Gentlemen, since our recess last week, I spent several days reviewing my notes, I have examined certain of the exhibits in which I was interested, gone back over certain portions of the transcript that I thought critical, so I am ready to render a verdict, and I think, though, it might be appropriate to comment briefly on some of the aspects of this case so, hopefully, you may understand it beter."

First, about the so-called vouchering system that Mr. Eisenberg used. My feeling was that, even though this system that he used didn't measure up to the code or didn't satisfy the Government, so as not to properly reflect his income situation, and even though he didn't use any formal books to arrive at this, and even though it was a bit loosely used, mistakes were made, that alone would not have satisfied me as to any evidence of wilfulness.

But it wasn't uniformly used or applied, it seemed to me the formal system that Mr. Eisenberg used was

abused and misused, and it seemed to be — had too strong a relationship to the tax computation period and computation of taxes themselves."

This statement or conclusion is based on no evidence whatsoever. No one under the sun had any idea of Defendant's financial condition because most of the years records were never completed until from the following April 'til the middle of the next year. What is the relationship?

The judge continued: "I have taken — gave some thought to all the personal problems that Mr. Eisenberg has had. His traumatic experiences about his license. There was some hint during this trial of physical problems." Incidentally he has had a cerebral stroke and a massive coronary. "Some disagreement with his son and all. I hope that I don't lack understanding or serious personal problems as they effect a man's conduct. And I think that they might have served as some excuse and be a defense to willfulness unless some other patterns that I consider to be inappropriate showed through."

"As I considered the stock problems that Mr. Eisenberg had, too, considering the great size of the portfolio, all the transactions, the state of his office as evidenced in those pictures, the level of training of his staff, their competency, these considerations, I think they also might have justified without any willfulness certain omissions, certain mistakes. But these matters weren't isolated and they weren't alone. And it seemed to me that some of these things happened when some determinations were made where the gain or loss, as the case might be, could be the most advantageously absorbed in the tax return."

The court overlooked the fact that Defendant had never done bookkeeping, even having a stock girl check the 700 or more stocks on the computer printouts. There is no basis for the Courts conclusion whatsoever. Defendant didn't even have time to check the stock computer printouts.

"The matter of interest, interest deduction, again, considering this informal really faulty vouchering system, some mistakes might be expected and there would be no evidence of willfulness. But I can't accept that where some of this interest was deducted on obligations that weren't even in existence for the taxable year."

The statement that the obligation was not in existence is based on a bold face untruth by said Assistant DA Prosecutor Dubakey. The debt was in existence with a bank in Skokie, Illinois which wanted their money in a tight money market, and the renegotiation of the loan was purely and simply a fortunate and lucky act. Mr. Bukey apparently fooled the judge because the interest prepayment was part of the deal and the judge believed Dubakey and Mitchell.

The Judge also said: "Then on that year also we have the problem of the interest. '69 interest — interest on some '69 obligations deducted in 1968. These obligations weren't even in existence in that year and the interest was for the following year. And I consider him to be personally involved in those transactions, to have knowledge of them, personally signed the checks that were dated the year before. There was evidence that these checks, these blank checks, were given to him for his use, he had control of the, he signed them, so I think he was directly involved."

This conclusion is based on a vicious fraud on the Court. Notes that are renewed are not new obligations. Blank checks never filled out or used still in the file given to another bookkeeper who got into a fight with Angelo Biro were never used at all.

Defendant never filled out a blank check. They are still in the file the only ones talked about by Angelo Biro who was brought back from California, did not prepare records for 1968, 1969 and 1970, hardly spoke English and the unfilled checks are still in the file. Defendant never filled any out.

The Judge continues: "We had a problem of capital gains that year and there were omissions. I think that these, standing alone, might again have been explained as an oversight, just mistakes. Overall, I think the Government met its burden of proof of guilt beyond a reasonable doubt, although not beyond all doubt."

"Count 2 I consider to be the weakest count in the Government's case. We have the Cates' problem again. The evidence showed roughly billed around 39,000. Mr. Eisenberg paid him around 21,000. And he deducted a little over $37,000, but this time he deducted less at least than he was billed but more than he actually paid. So what was deducted doesn't fit either what was paid or what was billed, but it at least comes closer. But I think it has to be viewed in a lawyer context."

"The capital gains problem this year I thought was weaker, too. This was just a matter of the basis. Standing alone, I think that would strictly be a civil adjustment. There were some computations made and

one think and another. But it can't be viewed alone, I don't believe, in this overall three year picture, so I find the defendant guilty as to Count 2."

"Count 3, 1970, this Cates' matter escalates again. We have Mr. Eisenberg billed 27,000, paying around 22,000, but deducting about $17,000 more than he paid, around $39,000, so, again we have the two basic substantial errors. As in this third year, two prior years as to Cates still go uncorrected."

"The Wisconsin expense, I think that would have been a civil adjustment standing alone, considering the nature of his vouchering system. Even though it was paid in the following year by a check made out for the year 1970 but not issued until after his tax return was filed, I think that might have been a civil adjustment, but fitting into this whole picture, I don't see how it can be."

The theory that some of the interest were not even existent for the taxable year is a complete falsehood inferred by Mr. Bukey, the prosecutor, thru an absolute misrepresentation. The Court's conclusion is completely erroneous. Mr. Bukey absolutely misstated the truth to the Judge in creating any such impression. The interest was deducted on bank obligations that were in existence for the taxable year. The interest obviously had to be computed prematurely as part of the agreement to renew the loan in a miserable and rough money market. There was no prosecution testimoney in spite of a thorough investigation by Mr. Bukey and the Judge was led down the wrong path again.

The government deceived the Trial Court again. Has anyone actually examined the records involved?

Stipulation Number	Exhibit Number - W	Note and/or Liability Ledger: Number	Access Date	Due Date	Interest	Date Paid		
Americana City Bank								
33	14-1, page 1	181829	7/13/66	1/13/67	4130 00	1/17/67	Mat.	
33	14-1, page 1	100742	12/5/68	3/7/69	36159 8	3/7/69	Mat.	
33	14-1, page 2	108237	12/5/69	3/5/70	44812 3	3/5/70	Mat.	
33	14-1, page 3	115077	12/2/70	3/2/71	33573 6	3/9/71	Mat.	
First National Bank of Lincolnwood								
35	15-2, page 2	12767	1/19/68	7/1/68	9700 88	1/19/68	PP.	
35	15-2, page 3	14308	10/1/68	3/31/69	70777	3/31/69	Mat.	
35	15-2, page 3	15348	3/31/69	9/30/69	71166	3/31/69	PP	
35	15-2, page 3 & 7	15348	3/31/69	9/30/69	32736 7	3/31/69	P.P.	20,723.88
35	15-2, page 4 & 7	14934	1/17/69	4/7/69	32578	3/31/69	Mat.	
35	15-2, page 3 & 6	17314	3/31/69	10/1/70	8022 22	3/31/70	PP	12,004.44
35	15-2, page 3 & 6				3782 22	3/31/70	PP	

Taxpayer's cancelled check: Date	Number	Amount	Exhibit Number		Note: Rate of Interest
12/31/66	16 0[illegible]	4130 00	W4-12, page	18	6.25%
12/31/68	19203	36159 8	"	19	7.50%
12/31/69	21416	44812 3	"	20	9.50%
12/31/70	55354	33573 6	"	21	11.00%
					6.5%
					7.00%
12/31/68	19299	20723 88	"	26	7.00%
					7.00%
					7.00%
12/31/69	21420	8004 44	"	28	8.00%
12/31/69	21418	4000 00	"	27	8.00%

Dean Bank											
36	16-1, page	1	17934	1-15-67	1/3/68	32	50	1/16/68	mat	4(36)	
36	16-1, page	1	18564	1/16/68	4/2/68	430	57	1/16/68	PP		
36	16-1, page	1	21405	3/21/69	6/18/69	1057	85	3/21/69	PP		
36	16-1, page	1	23967	3/26/70	6/15/70	1311	18	3/21/69	PP		
Bank of Commerce											
37	17-1, page	1	7540	12/5/66	3/6/67	659	97	3/6/67	mat		
37	17-1 PAGE	1	14106	12/27/68	3/28/69	725	24	3/17/69	MAT		
37	17-1 PAGE	2	16879	12/22/68	3/23/70	904	41	3/23/70	MAT		
Upper Avenue National Bank											
38	18-1		57957	6/17/68	DEMAND	1315	32	4/8/69	MAT		
38	18-1		57957	6/17/68	DEMAND	1595	63	1/8/70	MAT		
Oakland State Bank											
39	19-1 PAGE	1	9972	10/17/68	3-22-69	1945	00	3-20-69 3-24-69	MAT		
		2	11484	9-18-70	3-13-71	2303	25	3-11-71	MAT		
BANK OF RAVENSWOOD											
41	20-1 PAGE	1	8653	12-21-70	3-22-71	1251	25	3-22-71	MAT		

						6.50%
12/31/67	17700	443907	"	30		7.00%
12/31/68	19395	1057 85	"	31		7.75%
12/31/69	21419	1311 18	"	32		9.50%
12/31/66	16079	659 97				6.75%
12/31/68	19291	725 24	"	33		7.50%
12/31/69	21417	904 41	"	35		9.00%
12/31/68	19300	1315 32	"	41		7.00%
12/31/69	21267	1595 63	"	42		
12-31-68	19296	19500	"	46		
12-31-69	19298	175000	"	47		6.50%
12-31-70	5359	230305	"	48		8.00%
12-31-70	5413	125125	"	49		9.00%

It is difficult to believe the answer in the affirmative. An examination of the proposed government stipulation which was finally introduced by the Prosecutor June 1976 has a table of loans which proves how interest rates were going up wildly while Defendant was scrambling for loans and replacements. He never was given a table; he was only told notes were running out. Not one Lincolnwood Bank loan in Chicago was for over a few months. The letters "p.p." are obviously for "prepayment" or "post payment." The government knew this all the time. Yet the judge was misled and the guilty finding was based on a fraud by the IRS. The tremendous amounts of loans in Milwaukee and Chicago are not all shown on the schedule, either.

There were No Felonies Here

To continue with the Judge's decision, on P. 1141, "So, gentlemen, let's look at them on a count-by-count basis."

"Count 1 has to do with 1968. Here we are faced with the Cates's problem which runs for three years, and I consider it a serious situation. In that year, roughly, as I recall, Mr. Eisenberg was billed about $8,500. He paid about $3,000, yet he deducted $14,000. There is a big spread there. Two mistakes. Because he deducted more than he was billed and he also deducted more than he paid."

"I note that one of the exhibits for that year, I forget the number now, showed that the 31st of December, about thirty checks, different checks, were made out to Mr. Cates. The total of those checks was more than he was actually paid. And these errors as the Cates' matter extended over a period of three years."

"At the end of the three years, he deducted about 40 percent more than he paid, and even about $15,000 more, somethin gor that sort, than he had been billed."

"I think Mr. Crowley put his finger on a very critical issue, and that was the willfulness and knowledge and intent, but it seemed to me that this was one of the most important matters that Mr. Eisenberg had, personal matter to him, close personal contact with Mr. Cates. They had discussions together about the billing. There was evidence that the statements were put on his desk. He personally signed the checks. So I think he had knowledge and was involved. So I really couldn't consider these Cates' matters as innocent, isolated mistakes. And I couldn't see how he could avoid the inference of knowledge of what was going on and shift responsibility to others in these Cates' matters."

Why can't the Judge understand two government or private departments functioning within the government framework as well as a private company.

Defendant could not have possibly have known what any balances were because there is a great deal of difference between signing a postdated or blank check and a balance which ensues on a subsequent date. It is physically against the laws of mathematics and nature to know what a balance is at a subsequent time when an unknown figure is paid during the interim. Had he even seen incoming bills in the absence of balances of which he could not have known, since payments were being made purely and simply in the judgement of the bookkeepers, there is no reason not to accept the plain, unvarnished fact that Defendant

was signing in advance blank checks which would be paid on account.

Since neither Cates knew any other method of bookkeeping, nor was the Defendant aware of actual bookkeeping operations, it was a case of the blind and the halt, both good fellows, discussing making payments on account without any documented recorded balances specifically in mind. What is so difficult to understand under the circumstances when neither individual was a bookkeeper or a recorder?

The truth of the matter is that the Cates legal services were continuous and protracted covering years of work, and there is no reason for Defendant's bookkeeper, Mrs. Bolden, to establish uniform compulsory payments to the method of billing when she was continuing a continuous payment based on her ability to pay. There was neither a plot nor any benefit whatsoever to the Defendant, and Ethel Bolden has explained her computations adequately, as well as on the Motion for New Trial based on evidence, with an affidavit signed by Richard Manning, an attorney for the Defendant when he had absolute proof how Mrs. Bolden had computed her payments. Certainly there was no fraud. Yet the Court who had only heard half of a trial wouldn't take the time to consider the full explanation of how Ethel Bolden had computed her payments.

The Wisconsin expense with respect to the payment of the $20,000 fine for reasons aforestated to the Wisconsin Supreme Court is characterized by Judge Wood as a civil adjustment.

Although the check was originally issued when due,

it was stayed and became stale dated, because of an appeal to the United States Supreme Court which granted a temporary stay. Payment of the bill might have terminated the case. The petition for certiorari was ultimately denied as it could have been at any moment. Is the Defendant supposed to be a prognosticater who can tell when the amount was due before the stay granted by the United States Supreme Court, the issuance of the stay order itself, issuance of the State Court Mandate, re-issuance of the State Court Mandate or at what point should the check have been cancelled, re-written, certified? The procedure was decided by the Certified Public Accountant and that was the end of the situation. IRS was smoking a strong pipe with all these weird ingredients.

Neither Mr. Cates nor the Defendant ever knew in the slightest what the exact balance of the bill was. The Defendant's law affairs, together with his law practice, together with his various associates, received money that was paid out as available through the Defendant's bookkeeper, Ethel Bolden. Mr. Cates had the same bookkeeping setup himself. Mr. Cates never said that the Defendant knew what the balance was. Mr. Cates knew that he had money coming and that the case was still going on with weekly checks coming from the Eisenberg-Kletzke-Eisenberg law office through bookkeeper Ethel Bolden, signed in advance by the Defendant and sent out for bills to be and for which had already been occurred. There is no evidence of fraud in any respect, shape, form or manner. The bill was not for one Eisenberg, it was for two Eisenbergs, both adults.

The Court continues on as follows:

I find the defendant guilty as to Count 2.

Count 3, 1970, this Cates' matter escalates again. We have Mr. Eisenberg billed 27,000, paying around 22,000, but deducting about $17,000 more than he paid, around $39,000, so, again, we have the two basic substantial errors. And in this third year, two prior years as to Cates still go uncorrected.

"The Wisconsin expense, I think that would have been a civil adjustment, standing alone, considering the nature of his vouchering system. Even though it was paid in the following year by a check made out for the year 1970 but not issued until after his tax return was filed, I think that might have been a civil adjustment, but fitting into this whole picture, I don't see how it can be."

Who owed the bills after the firm breakup? Sydney M. Eisenberg or his son Alan Eisenberg? Is this the type of truth the U.S.A. was meant to prosecute? Have we no protection against such law upholders?

Is it the American way to lock up the Chief Bookkeeper, Mabel Peterson in a witness room and not release her until after the Federal Case is in so that she stumbles around the Federal Building? She was sent a letter a month or so later releasing her as a government witness. Why?

She kept all the real estate building tenant collection and all note and mortgage records and could easily have testified Defendant never even saw any records. He signed tax returns after the CPAs signed them. Justice here has gone astray and the U.S.A. is

really in trouble if this type of treatment is considered the way to practice law and justice.

Mabel Peterson is an elderly woman who obtained her bookkeeping training in a Boston business college. Mr. Bukey and Mr. Mitchell must have known he would not call her as a witness but confined her anyway. Why? Because he knew Defendant knew nothing about the vast multitude of records and probably to keep her from saying the five or six unsigned checks of previous years were still unsigned, unused, and available for examination. Defendant's counsel saw no case at all and quickly closed the case. The trial judge said there was plenty of time to reconsider the matter. The truth of the fact is that the door of justice was slammed and lock on as unfair a situation as a fiction writer could have created. Only the U.S. Supreme Court can now undo the wrongs enumerated here. Will it do so? We hope and pray it will.

CONCLUSION

Wherefore, for the above and foregoing reasons, the judgment of the Court below should be reversed.

There was clearly no criminal intent proven in this case.

In the government's brief (p. 17) to the Court of Appeals, it twice describes the purpose of 18 U.S.C. §3288, where it states it applies "where language inadvertently has been included in a charge which inaccurately describes the alleged criminal conduct", and again " 'to . . . extend the statute of limitations in criminal cases, so that a person who has been indicted under an indictment which would not support a conviction shall not escape . . . ' "

Here, to the contrary, the initial indictment by the grand jury precisely reflected the conduct which had been presented in the evidence submitted to it, and would have sustained conviction if proved, which of course it was still unfair.

Also contrary to the government's contention, the authorities it submits do not contain "facts remarkably similar to those presented here. A brief review of those cases will so demonstrate.

In *United States v. Bair,* E.D. Wis., 221 F. Supp. 171, the infirmity was that the indictment was duplicitous. Obviously an indictment cannot stand on the charge that allows conviction to rely upon two alternatives. That is a "defective" indictment, in accordance with Section 3288. The Government's next case *United States v. Strewl,* 2 Cir., 162 F.2d 819, was discussed, and in fact quoted from at page 9 of our Brief-in-Chief, and stands for precisely the proposition we propose here. Nor is *United States v. Porth,* 10 Cir., 426 F.2d 519, (Gov. Answer page 10) of any assistance. Not only was there a finding of defectiveness and insufficiency on a defense motion (on some unrevealed ground), but there was a great question as to whether the statute of limitations had in fact run, and it does appear that in that case the six year statute of limitations was controlling, as opposed to the contention of the defendant that it was three years. (See 426 F.2d at pages 521 and 522)

United States v. Wilsey, 10 Cir., 456 F. 2d 11 (upon which the government also apparently relies, even though the saving statute was found inapplicable), is superlatively supportive of our position here and cannot give any support to the error in failing to dismiss Count One in this indictment.

Nor do we see any comfort to the government in *United States v. Moskowitz,* E.D.N.Y., 356 F. Supp. 331. There the procedure set out by Section 3228 of Title 18 was not availed of. The question of whether the procedure used by the government here would have been applicable in the circumstances was never reached. The statements by the Court speaking *ex cathedra* is neither persuasive nor authoritative.

IRS should operate on a common sense basis and be used as a tool for no one or it can become a nightmare for everyone.

Respectfully submitted,
Sydney M. Eisenberg,
Petitioner

APPELLANT'S APPENDIX

November 1, 1977
(Argued September 19, 1977)
(Title and Venue Omitted)

ORDER

Sydney M. Eisenberg appeals from his conviction on three counts of wilfully making and subscribing a false individual income tax return in violation of 26 U.S.C. § 7206(1). For the following reasons we affirm.

I.

Eisenberg's primary contention on appeal is that the evidence is insufficient to support the findings and judgment of the trial court. More specifically, he argues that there is no evidence to establish that he knew that his income tax returns were false, and hence, no evidence to establish the requisite criminal intent. Emphasizing his reliance on bookkeepers and accountants in the preparation of his returns, he argues that the probative evidence leads in fact to the opposite conclusion, namely, that the incorrect returns were the result of employee errors of which he had no knowledge.

In this connection, the appellant points first to the testimony of his bookkeeper, Ethel Bolden, who claimed full responsibility for the overdeduction of payments to Cates, the attorney who represented Eisenberg in disciplinary proceedings before the Wisconsin State Bar. Similarly, the appellant cites the testimony of his accountants and argues that the erroneous treatment of capital gains from the sale of stock was solely the result of mistakes and oversights on their part. Finally, he insists that the various deductions taken in improper years (most notably the deducted interest ex-

pense) were understandable errors that could be attributed largely to his hybrid cash-accrual accounting method. But whatever the explanation for the deficiencies, Eisenberg argues, there is in none of these transactions any factual support for the conclusion that he had knowledge of the incorrect statements. The trial court's finding to the contrary, he suggests, was improperly based on its disbelief of Ethel Bolden's testimony, together with "loose inferences" drawn from "neutral facts."

Although the appellant is correct in stating that a criminal conviction cannot be predicated solely upon disbelief of witnesses' testimony, *United States v. Pechenik*, 236 F.2d 844, 847 (3rd Cir. 1956), we cannot agree that the trial judge did not rely on any positive evidence. We note in this connection that the Government "need not adduce direct proof of intent. It may be inferred from the defendant's acts." *United States v. Spinelli*, 443 F.2d 2, 3 (9th Cir. 1971). And here, the trial judge relied on circumstantial evidence of the defendant's bad faith or evil intent as well as credibility determinations to reach the finding of guilt. See *United States v. Scher*, 476 F.2d 319 (7th Cir. 1973). Thus, in the case of the overdeducted payments to Cates — overdeductions that figured prominently in all three counts — the lower court based its findings of knowledge on evidence that Eisenberg had discussed the billing with Cates, that Cates' billing statements had been placed on Eisenberg's desk, and that Eisenberg had personally signed the checks. Similarly, the trial judge relied on evidence that Eisenberg had personally signed backdated checks to link him with the deduction of interest payments on obligations that were not in existence in the year of the deduction. More generally,

while indicating that such items as the erroneous treatment of the stock transactions or the improper deduction of the payment to the State of Wisconsin could not alone establish wilfulness, the trial judge found in the appellant's financial activities over the entire indictment period a pattern of manipulation that bore "too strong a relationship to the tax computation period and computation of taxes themselves" (Tr. p. 1140). He thus refused to treat the failure to report capital gains and the repeated deductions in improper years as innocent or isolated mistakes.

To determine the sufficiency of the evidence, we must view that evidence and all reasonable inferences therefrom in the light most favorable to the government. *Glasser v. United States*, 315 U.S. 60, 80 (1942). Under this standard of review, we cannot agree that a rational trier of fact could not have found beyond a reasonable doubt that Eisenberg had violated 26 U.S.C. § 7206 (1).

II.

The appellant also challenges the judgment of the lower court on several other grounds. He first argues that the indictment and conviction on Count I were barred by the six-year statute of limitations of 26 U.S.C. § 6531. Although the original indictment was returned before the six-year period had elapsed, the Government subsequently moved to dismiss the indictment because certain figures had been improperly designated as "gross income," rather than as "adjusted gross income." The trial judge granted the motion, dismissing the indictment as "technically defective," and a second indictment was returned nearly five months after the statute of limitation on Count I had expired. However, the lower court found that the saving provisions of 18

U.S.C. § 3288 extended the statute to cover the second indictment, and thus denied Eisenberg's pretrial motion to dismiss.

The appellant claims that § 3288 does not govern Count I because no "legal insufficiency" appeared on the face of the indictment. This argument is not persuasive, however, in view of the plain language of the statute, language that permits the dismissal of an indictment found to be "defective or insufficient for any cause" (emphasis added). Moreover, both the legislative history and the judicial construction of § 3288 indicate that its central purpose is to safe guard the Government's interests in precisely this type of situation — that is, where the first indictment is dismissed for "technical reasons," and the continued running of the statute of limitations would permit the defendant to escape before a correction can be made. See *United States v. Porth*, 426 F.2d 519 (10th Cir. 1970); *United States v. Bair*, 221 F. Supp. 171 (E.D. Wis 1963). We therefore conclude that the trial judge properly denied the appellant's motion to dismiss Count I as time-barred.

We are also unpersuaded by Eisenberg's claim of selective and discriminatory prosecution. The mere fact that newspaper clippings dealing with his disciplinary proceeding before the Wisconsin State Bar were contained in the Government's file does not alone suggest an invidious discrimination. See *United States v. Peskin*, 527 F.2d 71, 87 (7th Cir. 1975). Nor does the record reveal anything in the conduct of the IRS to indicate that an unjustifiable standard was employed in the decision to prosecute. We agree, then, with the lower court that the appellant has failed to overcome the presumption of a good faith prosecution by presenting "facts sufficient to raise a reasonable doubt about the prosecutor's purpose." *United States v. Falk*, 479 F.2d 616, 620-21 (7th Cir. 1973).

Finally, we find no basis for the appellant's claim that the lower court erred in denying the motion for a new trial based on newly discovered evidence. Because such evidence was not presented to the court within seven days of the finding of guilty, the trial judge properly applied a more stringent standard, *United States v. Brashier*, 548 F.2d 1315, 1327 (9th Cir. 1976), and denied the motion on the ground that the evidence was "merely cumulative in nature" (Order, p. 16). On appeal, Eisenberg has made no argument to support the notion that this new evidence — mainly further testimony from Ethel Bolden — is anything other than cumulative. We thus find no justification for disturbing the trial court's ruling on this point.

Accordingly the judgment of the district court is AFFIRMED.

November 28, 1977.

(Title and Venue Omitted)

ORDER

On consideration of the petition for rehearing and suggestion for rehearing en bance filed in the above entitle dcause by Defendant-Appellant Sydney M. Eisenberg, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

"Then again we meet expenses that were incurred the following year but deducted in the prior year, sizeable ones, and it is not to be overlooked that he had a large capital gain that year which these helped offset." The capital gain was a corporate one. This is proven loud and clear.

And we had the amended return, but under the circumstances, that amended return, I don't think it cured the problems. "Why didn't the amended return do just that? Isn't it the purpose of an amended return?

That's the year where Mr. Crowley pointed out and went into some extent that had those expenses been deducted in the year in which they were incurred, where they really belonged, that Mr. Eisenberg would have had a tax refund. But, in spite of that, the inference that came through to me from the evidence as I sat and thought about it was that it seemed to be the motivating — the motivation and the problem was the current taxes for that year right at the time, the present year, and it gave me the feeling that, if there was some problem the following year, then that could be dealt with at that time if need be under this loose system. So I think I have to find the defendant guilty as to Count 3 also.

Overall, I thought there were weaknesses in various aspects of the Government's case, as I indicated before, in each count of varying degrees, but there is enough in each count in the case as they hold to compel a finding of guilty.

Now, gentlemen, there would be a period for post-trial motions, presentence investigation if that were

desired. I have had some conversations with counsel. What is your pleasure now, gentlemen about proceeding with this matter?

MR. CROWLEY: Your Honor, I might suggest that possibly there would be no real requirement for a presentence investigation, and if that meets with Your Honor's approval, I would move that sentence might be imposed at this time.

THE COURT: What is the Government's position?

MR. BUKEY: We have no objection to that proposal..

THE COURT: And then you would have time to file motions after that, Mr. Crowley, if you desired.

MR. CROWLEY: Thank you.

THE COURT: Twenty days?

MR. CROWLEY: Fine.

THE COURT: And if something should turn up in those motions, whatever they might be, the sentence would simply be vacated if you were successful.

MR. CROWLEY: All right.

THE COURT: If we are going to move to sentencing right away, gentlemen, do you have any recommendations to make or anything to say?

MR. BUKEY: Yes, we do. Prior to that, I think that it might be appropriate for the Court to enter formal findings of guilty as to the three counts.

THE COURT: Yes. That is my intention and that is to show in the record, that the defendant has been found guilty on each of the three counts.

MR. BUKEY: Our recommendation, Your Honor, in that a substantial fine be imposed on each of the three counts, and we stand mute as to the question of imprisonment.

Eisenberg Finally Is Allowed to Speak and The Judge Grants Adequate Time For Motions and Reconsideration

THE COURT: Mr. Crowley, do you have anything you want to say? I'm going to ask Mr. Eisenberg, too, if he has anything he would like to say personally.

MR. CROWLEY: Mr. Eisenberg would like to make a few remarks:

THE COURT: Mr. Eisenberg, glad to hear from you, Mr. Eisenberg.

THE DEFENDANT: If the Court please, this is a very difficult moment that arrived at in a lifetime where I thought that I had led a pretty decent, outspoken life. I have been bleased by God in many respects. I made friends all over the world. Tried cases all over the world. And I just simply never cared that much about money. It's just hard to believe what happened here.

I turn over these books to the accountants and to the bookkeepers. I had as many as ten bookkeepers in the office. Mr. Kelly had been in the office from about 1966 where he was in for some time. He said he went away for a time, but we had actually been under audit, Judge, for about twenty years, because I was outspoken, because I took unpopular positions, and the community found out I was right, by the time the unpopular positions were completed — for example, it's true that I got suspended, but only because I tried

to help a judge who was in a difficult situation, and it's like finding a man in a street who is unconscious and trying to help him, and, sure enough, when you expose who hit him, you are the one that are in danger of having the people doing the hitting turn on you.

That's a long story, but the fact remains, when the Supreme Court reinstated me, they assessed the costs against the Bar Association for reinstating me. I don't think any lawyer who'd ever had an experience like that ever got reinstated with the cost being — and the Bar Association wasn't even involved in the case. It was a case involving the Board of Bar Commissioners.

Anyway, I don't want to go into that at this moment because that, in itself, is an unbelievable story. But that was in 1968, Judge.

In 1967, I had been in Europe, among other things, with a case that I had in Milano against the Count of Dejano, the Count of Milano. I was representing unions. This office fought the Tucker murder case in 1968 in July. We finally got a decision and defended a man who had killed supposedly many police officers, or at least one and shot others, I don't remember the whole thing. We had our office shot up by people who openly said they were the Ku Klux Klan, called me, threatened my life, everything else, in '68, after we cleared him of first degree murder. Headlines this big across th newspapers.

I didn't have time with everything else that was going on that year, Judge. I was going from court to court. When I finished a jury trial, and my attorneys had the newspaper clipping that showed our office had the biggest plaintiffs practice in Wisconsin, numerically. I was going from court to court. The

courts would have the bailiff take me to the next court to make sure that I would try the case because I love trying cases. I enjoy trying them. If I thought the people were right, we took cases whether people had money or not. I never cared about money. It never was important to me.

And the only reason I got into this jam is because Ed Gillman, who testified from the stand, and I'm just going by the testimony, Ed Gillman told me that the corporations were losing money and you had to get more money. And I refused to raise the rents because these people, many of them were on Social Security, and didn't have the money, and I said, well, we have got $250,000 which came out in government bonds, paying 2 percent, and we have got stocks that could be bought to replace it, and I will refinance it. And we went in for a 6 percent refinancing which turned out to be low, but was high against a 4 percent million dollar mortgage, or million two, and gave me $250,000 to reinvest in stocks for the corporation.

I never thought it was my money. I would have segregated it in some account if there was some question of stealing. But I own all the stock in the corporations.

And Mr. Levine admitted on the stand that I had told him to watch the account, watch the stocks. Now there has been a misunderstanding in this trial. I did not tell him to watch the Gisholt stock. I told him to watch Gisholt and the stocks. I would have said Gisholt and the shares if I was just talking about Gisholt. I told him to watch Gisholt and the stocks, and I bought a hundred stocks to reinvest $250,000 while I am trying

cases every day and never saw the bookkeepers. Sometimes for months.

When I was knocked out of the box, I couldn't even go into the bookkeeper's office. I was told to stay out of the office. How could I be responsible for errors when the State on the one hand says stay out of the offices, and on the other hand says watch the records, and I tried to get in there to some extent, but the Bar Association did enter into the picture after I was knocked out of the box, and they were watching me going in and out of the office. So what I had to do is close off my office in the back so that I just go in and out of there and not walk in the rest of the office. I had a door there. So I only went into my office.

I have been convicted, Judge, for something I couldn't do. I couldn't watch it. And there was too much going on. I started the Sydney Hih project, that never came out, on Third and Juneau. I have people that were involved in arts and crafts, to make every minute of my life useful. And we took a whole half of block, I developed that thing from four walls, and put people in there, and I had an office there. None of this has come out.

And my attorneys are wonderful men. They are two of the finest lawyers I ever saw, and they mean well, there is no case, but by truth of the matter, Mr. Bukey, who I don't think understands the whole situation, and he sure don't know me, Mr. Kelly knows, that I trusted him. When he was going over the books, I told Kelly, if you find anything wrong, tell me. I thought he was on my side. So he was there day after day. He knows. I even trained him, he is here in the courtroom. I told him the benefits of real estate owner-

ship and everything. And he went through every invoice when he was there. Mr. Ubbelohde didn't come in and start looking for the bottom. Kelly had — was photostating everything after I was slectively picked out in '68, when that publicity hit, I'm sure, that I know who it was that had enough power in this community to go and file this stack of newspaper publicity on me, which is in their file and which I photostated for Mr. Bukey's file. This much. And I was a fit subject, perfect, selected as a Jew, and an outspoken one at that, one who is against bigotry in this community where we have got Nazis walking the streets and parading right today in downtown, and I had the courage, I thought, and I trained my family, to get up there and fight against that sort of thing.

And the same thing happened here. That I knew was coming, because I knew the only way they could get me was through IRS, and that's why I hired ten bookkeepers, and that's why I hired two CPA's. And Mr. Levine was told, watch every sale. I didn't just tell him to watch Gisholt. If you look at what was said and look at the evidence, I told him watch the stocks. Make sure that they are all pegged together, because I had to reinvest $250,000.

Now it's true, 40,000, as Your Honor heard, went on what was called a personal obligation. That personal obligation was a second mortgage on that property. I didn't pay any of my bills. I never saw a nickel of this money. I don't need any money. I was happy. I have a wonderful wife. I had no reason to take a dime. I didn't need it. And I didn't want it. And I wasn't trying to shave anything. I looked at the one report, that Gisholt report, which I knew I had intended

to be part of 250. I didn't tell Levine to go and take it out. I said check it. Because I have no bookkeeping experience. None. I never made out a corporate return in my life. And I stayed away from them.

And I don't have this coming. I really don't, Judge. I respect you. I know Your Honor was appointed to the Court of Appeals and I know you are a fine judge, and I respect you, but this is wrong. It just is not right. And Kelly knows it. He knows I depended on him. He had an office in my office building until we got into the thing with the judge. And I tried to save the judge's life, tried to set up a committee for him to help him, and the whole thing was turned around, and we found out certain people had taken off of his courtroom, Judge, ordered him out of the courtroom, took him into an office and shoved his head in the chair, and exposed it. It's all a matter of record.

But what happened? They turned the whole thing around. My poor kid and me. I exposed it.

But what can you do in a community like this? Where there is one newspaper. There hasn't been one article in the Milwaukee Journal since this case started, Judge. There was in the Sentinel. You can't believe what's been going on here. And instead of being a hero, I turn out to be a jerk. After exposing this matter of record.

Now certain people are afraid that I know too much. Because I know certain things, because of my union activities. Certain things were called to my attention. I tried to stop certain things from happening. And I'm going down the drain. And this community needs me. They need me. There are people that are praying for me. And I can furnish more years to help them,

if you will let me. I don't care about the money. It means nothing to me. Never did. I wear a suit, I bought this jacket at Sears Roebuck ten years ago. I don't need any money. And I wouldn't cheat the government.

And this didn't come out. My lawyers, I begged them for an opportunity to testify, and they mean well, but they are technicians. They wrote an excellent book. I didn't read it. But I'm sure it's an excellent book. And I love these two guys. They are fine fellows. But in order to convince the judge, this whole thing, I think, should have come out. My witnesses should have come out. Mabel Peterson, who is a mixed-up little old lady, never took the stand, they never called her. But she will tell you whether I have anything to say about what she gets out on the checks. Irene told you. This girl that set up the stocks told you, that I hand nothing to do with it. She set it up. I didn't even tell her what to do. I figured it would be honest. Gillman would talk to her. Levine would talk to her. He was in there, as he testified, with the stock deals.

There's one deal that bothers me, and that's that Bankers Utility. That's the one deal. And I can't figure out how that was overlooked. There's nothing else in this case. And the way — the reason it was overlooked, Judge, you can see, that what I tell you is the truth, I caught the one deal, I caught the one sale, and that was Gisholt. The Bankers Utility sale was something else. What fooled me, they had a sale on my own return, on Bankers Utility, but it was only a small amount.

Now I looked at that — these returns. I didn't get much of a chance to look at them because they brought them in the last day, but, Judge, I looked at it, and the

thing that threw me is when I looked at it, the Prospect Heights and Shoreland Manor returns, those returns didn't show the sale, they just showed a loan. I didn't know Gillman set it up. I didn't know anything about bookkeeping until I heard this case.

Judge, for ten years I begged IRS to tell me what are you looking for. I begged them. I said, "Where is the mistake?" and they wouldn't tell me. "You will find out." Is that this Government? It that what we have sunk to? Ten years of hell, where I knew they were after me and didn't know how they were going to get me.

I didn't steal anything. I didn't mistake anything. And if they told me there is a mistake, I would have corrected it. I called up IRS and I talked to their Intelligence man, Mr. Howe, they have got the record. I said to Howe, "I'm going to come down there and I'm going to cross examine you and find out what I did wrong." They have the record. He said, " I won't tell you." This is two years ago.

How can this happen? Just to get me?

I wish, Your Honor, Your Honor will permit me to put some witnesses on. That will tell you that my desk, which looked like that picture, I couldn't possibly know what was on that desk. I never saw those Cate bills. If Margaret put them on my desk, I wouldn't know it. There is no human being would know it. The bills were there, Ethel testified, she dug them out of my desk. Three girls I needed to find anything on that desk. It takes three girls. I can have them testify for you. If I want something on the desk, I call.

Now, Mr. Kelly, and I asked him when he did it, he buttered up Margaret. And he said to Margaret, who's been with me thirty years, out in the hall, before she testified, that I was brilliant. Mr. Eisenberg knows everything on his desk. Margaret didn't know any better. She went back and cried when I discussed it with her. But he told her he knows everything on the desk, and that's the way Margaret, who is loyal to me, thought, well, he knows everything on the desk. But Margaret had to come in there with two girls to find things. I never saw the Cates' bill.

But, Judge, I know Cates had money coming. I am a lawyer. He had to live. I knew that Ethel was issuing checks to him. But who cared what she did. She's not a crook. I mean these people are honest. And she issued the checks as the money came in. Now if she made a mistake, she's made many mistakes, and what bookkeeper hasn't. Mr. Bukey made a mistake. On the indictment. He came in under the entirely — I'm not blaming him, and I understand he is fighting his best, and Terry Mitchell, I know his family and I love him, and I know they are trying to do a job. I have got nothing personal against them. I was disturbed with them at first, but then I realized it was handed to them, and, Judge, this case, Stan Gimbel went to Washington, you may as well know, Mr. Hyatt told him he was recommending dismissal at the end of the conference. Gimbel came back to me and said, "Forget it." The next thing I know, people that weren't in on the conference, Gimbel — after a month or two called them and said "It's one on one." Now they said this in front of Bukey and Mitchell. Gimbel was right out in the hall. I said, "Did you ever hear a case where they say that the file is papered," and that's what

Hyatt told Gimbel and Gimbel told me. I thought it was over. He said forget about it. And they still went forward. And the whole thing is a nightmare. How can this happen? The people that have accountants, have CPA's, depend on them. Gillman, neither one of them worked for me. I discharged Levine, or let's say we mutually agreed to discontinue when I found out there were mistakes.

I have spent — I have incurred bills, I have paid $35,000 to another accountant who sat through this whole trial and didn't testify to find out what was wrong. And he is giving me a bill for another fifty, which is impossible to pay at this moment.

I mean what else can I do? What would Your Honor do? Or what would anybody in this room do if the Government is out to get you, and stays on you, and while they are watching you, and taking all the time of everybody in the office, who spend more time giving them answers on documents that they would doing work, I mean what can you do. This is pure persecution.

Now I know when I got the motion out, when that motion was gotten out for selective prosecution, it's hard to believe. I can understand why Your Honor denied it. Be yet Your Honor found out that one of three cases was opened up in '68 on me, when they had nothing on me. Nothing had happened. And they open up a file. And I say why did you open up a criminal file on me, and I ask counsel, and counsel says they lost the papers. And I kiddingly said to Mr. Bukey, I would like to buy that shredder. How can you lose the papers? They opened a file on somebody. Why? Except to get rid of them.

Judge, this is a phony. I will abide by what you say. I have too much respect for the law not to. And I'm not going to walk around cursing anybody because, as counsel has been told, I never hated anybody over five minutes. I can't. That's one of my problems. I'm not mad at anybody. I just feel bad about it.

THE COURT: Thank you, Mr. Eisenberg.

THE DEFENDANT: I wish Your Honor would reconsider and give me an opportunity to put some more evidence in. I plead with you to do it. You have only heard part of the case. And my counsel felt that no case had been made out. I wanted to take the stand. And I was serious when I said I would take the stand the other day and question myself because I don't want to hurt their feelings. But everything I said to you will be proven and borne out. I did not deliberately encourage any errors. And if Kelly ever told me there was something wrong with the system, it would have been changed. But you can't year after year close it out. In fact, one year I think he found $5,000 in discrepancies, in mistakes. Why didn't he say he didn't like the system. He got the $5,000. It was paid like that. I erased it.

I just submit, Your Honor, I can't understand what happened there, because you didn't hear what I have been telling you. It wasn't told to you. But I would like to go on record, let them cross-examine me. I am not afraid of it. I have told that to Mr. Crowley ten times. I don't care if they cross-examine me from here to Chicago. Because I haven't even begun to tell you everything that was going on. I haven't told you anything about it in comparison to what really happened. You wouldn't believe it. You would if you heard it documented.

I'm going to ask for an apportunity to bring a motion, Your Honor.

THE COURT: Mr. Eisenberg, you will have twenty days or such other time as you might desire to file these motions. And let me say that your counsel, I agree with you, your counsel — you've got about as fine a counsel as I think anybody could find in these matters. And they certainly have my full respect and confidence. I admire the way they handle their work and try their cases. I have expressed my admiration for the government also.

I must say that it is not an easy thing for me to do either, to find anybody guilty. But based on the evidence, I think the case has been made out at this point, and I have no intention as I listen to this case to impose any time whatsoever on Mr. Eisenberg. I'm not going to add to all his problems any more than I am compelled to. I don't think it is an appropriate case, gentlemen, to spend even a day in jail.

Part of that feeling about this case was based on the arguments of counsel, some of those things I consider very mitigating. I have sent lawyers to jail for tax matters, accountants to jail, public officials to jail. This is not a tax evasion case. This is a time statement which the counsel has established to be less, and I do, too, and I think, under these circumstances, taking into consideration many of the things the defendant himself has said, it is not a case for any time. So it is going to be a matter of a fine only.

Anything you want to say about any recommendation in that regard?

MR. BUKEY: May I have just a moment?

One preliminary point, Your Honor. I believe, in accordance with the rules, it would be appropriate for Your Honor to inquire of the defendant personally whether there is any reason why we should not now proceed with sentencement.

THE COURT: That's really what I had intended to do and gave him the opportunity to speak. If there is any reason why it shouldn't be done now, otherwise we will proceed.

MR. BUKEY: As to the recommendation, the Government recommends a substantial fine on each count on the indictment.

THE COURT: Thank you, Mr. Bukey.

Anything else, gentlemen?

MR. CROWLEY: Nothing further.

THE COURT: Well, the maximum fine that could be impound could be awarded on each count, the maximum imprisonment would be three years on each count, and they might be made consecutive. I have already ruled out any possible confinement for this man.

I think a fine — some fine is in order, but I don't think the maximum is called for, and I don't think it is that important in this case. I think the purpose of the law has already been served by this trial, and a man of this type, to have to withstand all this, so I will impose what I consider a reasonable fine under the circumstances.

It will be $3,000 on Count 1; Count 2, which I thought was the lesser of all the counts, simply im-

pose a fine of $1,000; and another fine of $3,000 on Count 3, or a total fine of $7,000.

In view of all that's been said, I don't think any period of probation is necessary. I don't think Mr. Eisenberg needs any supervision at all. And I will give him up to ninety days to pay that fine or such other time as might be necessary depending on the outcome of the consideration of the motion.

If there is nothing further, gentlement, that will be the Judgment of the Court.

(Court adjourned at 4:45 o'clock p.m.)

AFFIDAVIT OF DAVID B. BUKEY

(Title and Venue Omitted)

David B. Bukey, being first duly sworn on oath, deposes and says:

1. I am an Assistant United States Attorney who is assigned to handle the prosecution of the above-entitled case. I am also the attorney who presented this case to the Grand Jury which returned this indictment.

2. As is reflected in a letter from affiant to Mr. James Shellow, attorney for the defendant Sydney M. Eisenberg, a copy of which is attached to his affidavit and designated Exhibit No. 1, the language of Counts I, II and III of this indictment states that the defendant Sydney M. Eisenberg reported "gross income" for each of the calendar years 1968 through 1970 of certain designated amounts, and further indicates that the defendant "received substantial gross income in addition to that heretofore stated for those calendar years."

3. Affiant hereby represents to this Court that the numerical figures designated as "gross income" in

each of the three counts of the indictment actually should have been designated as "adjusted gross income" and further that it was Mr. Eisenberg's "adjusted gross income" for each of the three years which it should have been alleged as underreported in each of the three counts.

4. Affiant further alleges that testimony concerning the above-described items of "adjusted gross income" and alleged underreporting of "adjusted gross income" were presented to the Grand Jury which returned this indictment, but were mistakenly characterized in that proceeding as "gross income" in both the questioning of counsel and the testimony of Special Agent Robert Ubbelohde.

5. Based upon the foregoing facts and circumstances, it is affiant's representation that the three counts of this indictment may be technically defective.

/s/ David B. Bukey
Assistant United States Attorney

AFFIDAVIT OF RICHARD L. MANNING

(Title and Venue Omitted)

RICHARD L. MANNING, being first duly sworn, under oath deposes and states as follows:

1. He is one of the attorneys of record for Sydney M. Eisenberg in the matter now before this Court.

2. On July 15, 1976, your affiant and George P. Crowley placed a long distance conference call to the offices of Sydney M. Eisenberg in Milwaukee, Wisconsin, for the purpose of questioning Mrs. Ethel Bolden regarding her testimony in this cause and pursuant to the preparation of post-trial motions.

3. In a conversation betweent Mrs. Ethel Bolden, Mr. Sydney M. Eisenberg, George P. Crowley and your affiant, Mrs. Bolden was extensively examined regarding the Richard Cates transaction particularly regarding checks issued to Mr. Cates in the year 1968. Mrs. Bolden had before her all of the Cates invoices and checks for the years 1968, 1969, 1970 and 1971. She stated that "I just don't know how I made these mistakes, it's been so long, I just don't remember what I did or what I looked at, I just don't know."

4. In order to examine her more closely about the specific facts, and because we had left all of the exhibits and documents in this case in Milwaukee, your affiant asked Mrs. Bolden to tell us what was the total amount owed to Mr. Cates for work performed in 1968. She said "just a minute, it will take some figuring, but I have the invoices here."

5. After some period of time, Mrs. Bolden replied, "Your total amount owed to Cates for 1968 is $12,925.86. We owed Cates $12,925.86 for 1968 work." We asked Mrs. Bolden how she arrived at that fiugure. She said, "I just added up the invoices, he billed us $2,762.38. in October, in November $4,551.38 and in December $5,612.10." Your affiant pointed out to her that that figure was wrong, that the total invoices in 1968 were around $8,000.00 and that she must have included both the monthly charges and the unpaid balance from the previous month. She said she added up the total on the last page of each invoice. Your affiant told her that the last page included the balance for the previous month. She said "You are right. "I am wrong." Your affiant asked her if she could have made the same mistake in 1968. She said "I could have." Your affiant

asked her whether that in fact was the mistake she made and she replied, "I honestly don't know, it's been so long ago."

6. The conversation concluded with a request that Mrs. Bolden send all of the material she had regarding the Cates transactions to us.

Further affiant sayeth not.

Richard L. Manning

AFFIDAVIT OF ROBERT UBBELOHDE

(Title and Venue Omitted)

ROBERT UBBELOHDE, being first duly sworn on oath deposes and says that:

1. He is the Special Agent assigned to the preparation of the investigation of this case. Affiant's duties in this case have been more fully described in affidavits previously filed with the Court in connection with pending pretrial motions.

2. He has reviewed all the contents of the investigative file and is personally acquainted with them.

3. He can state that to the best of his knowledge, none of the evidence contained in the investigative file of this case was in any way derived from interception of oral or wire communications of the defendant Sydney M. Eisenberg.

/s/ Robert A. Ubbelohde

AFFIDAVIT OF WILLIAM HYATT

William Hyatt, being duly sworn, makes the following statement pursuant to 18 U.S.C. 3504:

1. That he is a Trial Attorney with the Criminal Section, Tax Division, Department of Justice, and that

in such capacity reviewed the Internal Revenue Service's proposed prosecution of Sydney M. Eisenberg for the Department of Justice. He further states that he is familiar with the evidence proposed by the Internal Revenue Service to support this prosecution.

2. That the charges include the years 1968 through 1970, with the first fraudulent act occurring on or before April 15, 1969, and concerning the year beginning January 1, 1968.

3. That during the period prescribed by 18 U.S.C., Section 3504(a)(3), from January 1, 1963, to the present, he has been informed that the defendant has not been the subject of any electronic surveillance by any agency of the Federal Government.

4. That during the above period he has been informed that the defendant has not been incidentally monitored in connection with the electronic surveillance of any other subject by any agency of the Federal Government.

5. That he has been informed that the defendant was incidentally monitored when he placed calls to a third party who was the subject of electronic surveillance on May 6, 1959 and August 25, 1960.

6. That he has examined the transcripts of those brief telephone calls and has determined that they have absolutely no relation whatever to any of the charges loged against Sydney M. Eisenberg and that no evidence included in the case against Sydney M. Eisenberg could have in any way emanated from this electronic surveillance.

7. That no evidence in the Government's case as reviewed in the Department of Justice is in any way

derived from any electronic surveillance performed by any agency of the Federal Government.

/s/ William D. Hyatt

BURTON LEVINE, CPA
TRANSCRIPT OF TESTIMONY

April 9, 1975 Prosecutor David Bukey questioned Burton Levine, CPA. Burton Levine clarified the entire situation proving Sydney M. Eisenberg had nothing to do with all of the accounting records. Gisholt transaction in 1967 was not even involved in the years which was not in the subject. Anything more was needed after reading this transcript, it will take the courage of the United States Supreme Court or someone who will not fear any repercussions from a newspaper seeking domination of the minds of people. Even Rome fell.

BURTON LEVINE, having been first duly sworn, was examined and testified as follows:

EXAMINATION

By Mr. Bukey:

Q. State your full name and spell your last name for the record, please.

A. Burton Levine. L-e-v-i-n-e.

Q. You are a Certified Public Accountant?

A. Yes.

Q. You live here in Milwaukee?

A. Yes.

Q. You know an individual named Sydney Eisenberg?

A. Yes.

Q. How long have you known Mr. Eisenberg?

A. About twenty years.

Q. Do you at the present time do any work for Mr. Eisenberg?

A. No.

Q. You are a Certified Public Accountant?

A. Correct.

Q. And you have previously been interviewed by agents of the Internal Revenue Service relative to your preparation of Sydney Eisenberg's personal income tax returns for '67, '68, '69, and '70, have you not?

A. Yes.

Q. And you have also been interviewed from time to time concerning your knowledge of his financial affairs based upon having done certain accounting work for him; is that also correct?

A. Yes.

Q. And you understand that you are not a subject of this Grand Jury inquiry, do you not?

A. Yes.

Q. You do also understand that you have been placed under oath and giving false testimony under oath would leave you susceptible to a charge of perjury?

A. Yes.

Q. Mr. Levine, I have a few certain specific questions to ask you and you have been asked questions in these areas before. If you are uncertain as to what specific area I am referring and want me to clarify my question, I will be happy to do so. Do you understand that?

A. Yes.

Q. Are you a ware of a sale of stock which occurred in the year 1967 in a company known as the Gis-

holt, Inc., or referred to as the Gisholt stocks involving Mr. Eisenberg?

A. Yes, I am aware of it.

Q. Did you discuss the sale of the Gisholt stock with Mr. Eisenberg at any time prior to your preparation of the 1968 calendar return — strike that — 1967 calendar return, personal return?

A. What do you mean by "did I discuss it?"

Q. Mr. — either Mr. Eisenberg or one of his corporations had a gain of some $71,000 from the sale of Gisholt stock in the year 1967. Does that roughly jog with your memory?

A. I don't recall. That wasn't reported by me on his tax returns.

Q. All right. Now, do you recall originally preparing a return for the calendar year 1967 in which you did report on that return the gain from sales of the Gisholt stock? Excuse me, you recall the question?

A. Yes. I am trying to think. I can't say for sure if I did or not.

Q. Well, Mr. Levine, would it refresh your recollection if I were to ask you, do you recall giving a sworn statement in question and answer form to Special Agent Robert Ubbelohde at the time you were represented by Mr. Lincoln on October 26th of 1973?

A. I recall that question and answer session. I don't recall what answer I gave though.

Q. There was a question put to you and had to do with year-end discussion of stock. That is the only discussion you remember concerning stock sales for any of the years?

No, on the Gisholt I was under the assumption that he owned the Gisholt stock or Gidding & Lewis. He said, no, I don't own that stock. That's owned by the corporations, so I had to redo the return.

Now, does that refresh your recollection?

A. Right.

Q. Does that conversation with Mr. Eisenberg that I am interested in exploring at this time, did you originally prepare a return for the calendar year 1967 which listed the gain from the sale of the Gisholt stock on it — and when I say a return, I mean a personal return for Sydney and Miriam Eisenberg?

A. I have been away from his books a couple of years now. Under that question and answer period, I was a lot more active in it and I am sure the answer I gave there is more —

Q. Your recollection was better at that time.

A. So anything I said there would be more accurate than what I might be able to say now. If I said I prepared it then and talked to him about it, that is probably what happened.

Q. Do you recall anything specifically now at to whether or not you did prepare a return for '67 calendar year for Sydney Eisenberg and then subsequently redo it?

A. I would have to say, based on what I said there, that's what I did; but I don't recall.

Q. What discussion did you have with Sydney Eisenberg concerning the Gisholt stock at the time you presented your return you originally prepared to him?

A. I couldn't give you an answer to that.

Q. Did you ever have discussions with Mr. Eisenberg either at the end of the year or at the time that individual return was in the process of being prepared concerning his stock transaction?

A. Repeat the question.

Q. Did you ever have discussions with Mr. Eisenberg, sir, either at the time you were in the process of preparing returns or at the end of specific calendar years concerning his stock transaction?

A. Normally, no. Usually I got the information from brokerage statements.

Q. Who provided you with those brokerage statements normally?

A. Most of the time I called up the girl at the office and told her to send me all the brokerage statements.

Q. What girl wold that have been?

A. He had several different girls.

Q. Angela Biero, did you ever call her?

A. Yes.

Q. Mabel Peterson, did you ever call her?

A. Mabel had nothing to do with stock.

Q. The records you were furnished included brokerage statements?

A. Right.

Q. Was it on the basis of brokerage statements that were given to you by Mr. Eisenberg's representatives that you, in preparing your return, determined whether gains from the sale of stock were reportable on Sydney Eisenberg's return or some other corporate return?

A. I wouldn't decide if it was corporate return because I only got brokerage statements that were under his account name, personally. But it would have been from the brokerage statements. If the girl didn't have them, I called up the broker to get some that were missing.

Q. Would you have relied on any other records than brokerage statements generally?

A. Yes, if there was a sale, the girls usually had the information, what the stock cost because — I don't remember when — but quite a while back he didn't have that many transactions in stocks so it was on the books. I wouldn't want to give a time, but later on they became — there was a lot of transactions and he had one girl who just worked on stocks usually and she would keep the information and I would get it from her. The cost information of the original.

Q. Other than those records you have described, did Mr. Eisenberg ever provide to you other records so you could determine ownership of stock?

A. Not that I can recall.

Q. Did you ever have a question as to whether — let me back-up for a second. You have indicated you gave a true and correct answer in your sworn question and answer statement in 1973 concerning the Gisholt stock.

A. Yes.

Q. In that answer you stated that words to the effect, Mr. Eisenberg said I don't own that stock; the corporation does.

A. Okay.

Q. You relied upon records which were referred to you for the calendar years '67, '68, '69, '70, on specifically brokerage statements to determine gains or loss from the sale of stock which were reportable on Sydney Eisenberg's personal returns?

A. Correct.

Q. Sydney Eisenberg personally did not provide you with any other records to determine the correct ownership of stock, if that was ever in issue?

A. On the Gisholt he told me about it.

Q. In 1968, '69, '70, do you recall any other records being furnishd to you?

A. No, not that I recall. I wouldn't have asked him for any.

Q. Sir, for the calendar year 1968, approximately 2,900 shares of Bankers Dispatch or Bankers Utility stock was sold in November of that year with a resulting gain of some $62,763.42. Have you been questioned about that transaction before by Internal Revenue Agents?

A. I don't know. I don't think so.

Q. Do you recall in your dealing either with Mr. Eisenberg or in the course of this investigation, sir, whether or not a matter concerning Bankers Utility has ever been discussed with you?

A. Probably.

Q. Do you have any recollection as to wthere or not Sydney Eisenberg provided you with any brokerage statements when you prepared the 1968 individual income tax return for him reflecting that Bankers Utility was owned by Sydney Eisenberg?

A. Well, all I can say — you're asking me of specifics. I really can't recall specifics. All I can tell you,

what the procedure was. I would get all the brokarge statements of the stock that was in his name and I would work — I normally didn't ask him. I would call up the girl.

Q. I asked you a few minutes ago whether you recall any discussions at the end of the year or at the time you were preparing returns, with Mr. Eisenberg concerning stock gains and losses. Now, did you have such discussions?

A. I couldn't pinpoint any particular year in the last fifteen or twenty years that I have been doing his work, but — I can't recall specifics, but I am sure there were times in the past twenty years when as a matter of fact, probably most likely in December, if he had some gains he would say how much gain did I have in the past year so I know if I want to sell some stock to take the loss to offset the gain.

Q. Sir, I would ask you if you were asked this question and gave this answer at the time of your sworn question and answer statement:

"Q. Will you explain a little bit more as to what discussions you had at to taking losses that year?

And the year involved is 1967 — going back a couple of questions.

"A. In other words, if he showed a profit on some stocks he usually had some stocks which were at a loss. I would want to take a loss to eat up the stock sale."

Is this correct?

A. That's what I am saying now.

Q. Did you ever have any discussion with Sydney Eisenberg in which the topic was, how stock would

be attributed either to individual or corporate return depending on whether you wanted to show a gain or loss?

A. You have to — I don't understand the question.

Q. You're aware from your years of dealing with Sydney Eisenberg that he had some seven corporations?

A. He had numerous ones. I don't know.

Q. Approximately seven. An that in those corporations it was often the case that he was the sole stockholder of the corporations?

A. Yes.

Q. And you're also aware, are you not, that with respect to a number of those corporations, authorizations were given by the corporation allowing him to buy and sell stock in his personal name, Sydney M. Eisenberg?

A. Yes.

Q. You're aware of all of those facts?

A. Right.

Q. You're also aware that it has been alleged that in a number of instances stocks were bought and sold in which the United States has alleged those gains should be attributable to Mr. Eisenberg's personal return and in which others have stated that those gains and/or losses were actually gains or losses of some other corporation. Follow that? You understand that that issue has been presented during the course of this investigation?

A. I'm not sure now.

Q. I will rephrase the question. You understand the issue at to whether gains from certain sales of stock, the issue has been raised as to whether

those gains were properly reportable on Mr. Eisenberg's personal return or certain other coporate returns.

A. I know an issue has been raised, I don't recall. I thought it was just Gisholt. I am not sure.

Q. Now, in connection with that issue, the fact that authorizations were given allowing stock to be bought in the name of Sydney M. Eisenberg and the fact that such stock was bought and the fact — therefore, makes it material, does it not, to determine with whose funds certain stocks were bought and sold correct, in an attempt to establish ownership?

A. I think you're asking me a legal question.

Q. My question is, did you ever undertake to determine other than from brokerage statements whether any particular stocks were actually stocks owned by Sydney Eisenberg or by the corporations.

A. I think at one time — I think so. I think Mr. Zerbel tried to —

Q. Mr. Zerbel is an accountant who was brought in after this investigation was commenced, correct?

A. I think so.

Q. I am talking about at the time you prepared the individual returns for '68, '69 and '70 for Sydney Eisenberg, in the course of your preparing those returns, did you undertake any kinds of analysis in attempts to establish ownership of stock?

A. I relied exclusively on the brokerage statements.

Q. Did Mr. Eisenberg ever, with the exception of the Gisholt transaction, did Mr. Eisenberg ever give

you any indication or information which contradicted those brokerage statements in any respect?

A. I don't know. I don't recall.

Q. But your general practice would have been to rely upon brokerage statements and the records furnished to you by Mr. Eisenberg's employees?

A. Normally, yes.

Q. And you have no specific recollection as to whether Mr. Eisenberg furnished you with any information to reflect that the gain on the Banker Utility stock should actually have been reported on his return?

A. I couldn't answer in regard to one specific stock.

Q. The only specific one you recall now is Gisholt?

A. Right, because that came up twenty times in the past five or six years.

Q. Now, did you also prepare the amended 1970 individual tax return for Sydney Eisenberg?

A. Yes.

Q. You amended that return because you had inserted the fact that there were $39,000 of expenses taken in the year 1970 which were actually '71 expenses?

A. I don't know if those were the years, but there was one point when I amended a return because expenses were taken in one year which belonged in another year.

Q. You're aware, are you not, that amended return was only filed after the Intelligence Division of the Internal Revenue Service advised Mr. Eisenberg that they were conducting an investigation dealing with alleged criminal violation of Internal Revenue Codes?

A. No.

Q. Did Mr. Eisenberg ever instruct you to amend that return?

A. No.

Q. How did you happen to determine that amended return should be filed for that year, to the best of your recollection?

A. I think I discovered it.

Q. How did you discover it?

A. That I don't remember. Can I ask you a question? When did the intelligence Division come in? You said the return was prepared after the Intelligence Division came in?

Q. Amended.

A. What year amended? So, the '70 would have been filed in '71. And I was working on the — it was while I was working on the '71 return that I discovered it.

Q. To clarify your question, Mr. Eisenberg was first contacted by Mr. Schwabach of the Internal Revenue on October 14, 1971.

A. Then it was after that case.

Q. Now, Mr. Levine, just a few more questions. You were given the cash disbursement journal of Mr. Eisenberg as a receipt of documents to use to prepare his returns, were you not?

A. Right.

Q. And did you ever know that those cash disbursement journals for the years '68 through '70, contained a large number of checks written in December of those months?

A. Did you stop?

Q. Yes.

A. Probably. I normally — the only reason I took the cash disbursements journal — I usually work with general ledger. The only reason I work with disbursements is if I had to find something.

Q. During the course of your preparation of '68 through '70 returns, did you ever have occasion to examine the circumstance that a large number of checks were written in December of the year which didn't clear banking channels until sometime later? Significantly later?

A. Did I have a chance to examine the checks?

Q. Were you ever given information which disclosed that fact to you, first of all?

A. I think the revenue agent may have brought it up.

Q. Did Mr. Eisenberg ever indicate to you that he was holding checks in any of those years which had been dated December but, in fact, had not been sent through until — into the next year?

A. This, I don't recall.

Q. You have no recollection?

A. Whether he ever told me about it?

Q. So then, at the time you prepared these returns, you were not aware that checks were being held for those particular years?

A. I should clarify that. I know that in the last — except for the last few years when I haven't been doing his work, I myself received checks sometime after they were written out but this was supposed to be the way the books were set up.

Q. Who told you that?

A. I started working on his books in the middle 1950's. I don't know who it was who was working for him

at that time, but she had — I don't know if she set it up. The system was that the bills were to be recorded — the checks were to be written when the bills came in and recorded. And this was supposed to have been the practice for at least the past twenty years.

Q. But you have left out the other half. What was done — were the checks always sent out after that?

A. I don't believe so.

Q. How did you know that was the practice?

A. I never paid any attention to it until the audit came up and the only direct knowledge I have of it is that from my checks that are at a different time.

Q. Other than direct knowledge acquired by payments you received from services and from the fact audit was subsequently conducted, Mr. Eisenberg never discussed with you the fact that checks were being held which had been issued?

A. I don't know if he personally discussed it with me.

Q. All right. I have another question. How long have you been a Certified Public Accountant?

A. Fifteen years.

Q. I'm going to ask you a hypothetical question. If an individual incurs an expense and is on the accrual method and has no intention of paying that expense in the future, is it your opinion based on your practice that that expense is properly accruable? Do you have the question in mind?

A. If a person is on accrual basis and he gets a bill and accrues it on the books but has no intention of paying it —

Q. Is that properly an accrualing based on your accounting experience?

A. I don't know how you would determine that the person isn't going to pay it. If a businessman gets a bill, the normal procedure would be for the girl, if they're on accrual basis, to record the item. Now, when you determine — why would you determine you're not going to pay it unless you have a grudge? I don't know why you would say you're not going to pay a bill if it's a legitimate bill.

Q. I just have a couple more questions, Mr. Levine.

After you received your subpoena to appear here before this Federal Grand Jury, did you at any time meet with Sidney Eisenberg?

A. No.

Q. Did you have any conversation with Mr. Eisenberg?

A. Yes.

Q. During that conversation, did you state to him that you had been subpoenaed to appear here today?

A. Yes.

Q. Did you receive — did you discuss with Mr. Eisenberg any of the matters about which you have testified today?

A. No. We just talked in generalities.

Q. You just talked in generalities?

A. Yes.

Q. You had been subpoenaed to appear before this Grand Jury, then you had a conversation with Mr. Eisenberg and your testimony is you just talked in generalities?

A. Yes.

Q. Did you discuss at all the course of this investigation and the status of this indictment? I remind

you,sir, you are under the penalty of perjury in your testimony here today.

A. What do you mean "course of investigation?" I have been —

Q. One way as to discuss it, did you discuss — what did you say to him and what did he say to you?

A. Basically, why are they hounding me? Everything is on the record. You gave them all the information that was necessary. All the records — just let the record speak for itself.

He has a tendency to go on and on. That's what I mean by generalities. My impression — I suppose it's not easy for a person who could possibly be indicted to be calm about it.

Q. I am not getting into that. I am asking you, sir, whether or not Mr. Eisenberg gave you any suggestions or instructions regarding your testimony here today?

A. No.

MR. BUKEY: Any questions from members of the Grand Jury?

A JUROR: At any time during the years that you prepared these returns, did you ever actually see the assets insofar as the stock certificates are concerned?

THE WITNESS: No.

A JUROR: You wouldn't know in whose name they were issued?

THE WITNESS: No.

A JUROR: Isn't it common for CPA's to want to see the actual assets?

THE WITNESS: If you're conducting a certified audit.

A JUROR: You never did?

THE WITNESS: No.

MR. BUKEY: Okay, thank you, Mr. Levine.
(Witness excused.)

CONSENT OF STOCKHOLDERS
of
SHORELAND MANOR CO.
March 31, 1965

The undersigned, being all of the shareholders of SHORELAND MANOR CO., a Wisconsin Corporation, acting pursuant to §180.91 of the Wisconsin Business Corporation Law, hereby unanimously consent to the adoption of the following resolutions, such resolutions to have the same force and effect as if adopted unanimously at a meeting of Stockholders of the corporation duly convened March 31, 1965.

RESOLVED that since SYDNEY M. EISENBERG is the only Stockholder in the SHORELAND MANOR CO., a Wisconsin corporation, he hereby waives the sending of notice to himself and consents to having an immediate meeting of Stockholders for the purpose of effecting the matters hereafter to be resolved at this meeting.

RESOLVED that SYDNEY M. EISENBERG, president of SHORELAND MANOR CO., a Wisconsin corporation, is the sole stock holder in said SHORELAND MANOR CO. and certain funds are, as of this date, March 31, 1965, becoming available for investment purposes on behalf of the corporation. FURTHER, BE IT RESOLVED that SYDNEY M. EISENBERG be authorized to purchase common stocks, bonds, debentures and/or any other types of

investments so as to offset the tremendous losses suffered by this Corporation. SYDNEY M. EISENBERG being sole stockholder, attorney for the corporation and President of the corporation, is duly authorized to place said stocks in his own name, for his own convenience, and concluding purchases and sales, providing however, that he shall report all gains or losses to the corporation, and providing further, that it is AGREED and UNDERSTOOD that the transfer of the stock into his name is made for the purpose of the corporation for the purpose benefiting said corporation because said corporation is direly in need of the gains to offset the financial losses of the corporation. All such gains and losses are on behalf of and belong to the corporation, not SYDNEY M. EISENBERG.

SYDNEY M. EISENBERG, further, by virtue of his experience and knowledge of the machine tool industry, as attorney for one or more of the labor unions operating in this area, said SYDNEY M. EISENBERG, having further, full confidence in the future of the automated machine tool industry, is further expressly authorized to make purchases on behalf of the corporation in his own name, and in his own accounts, all on behalf of said corporation, in the Gisholt Machine Company of Madison, Wisconsin, said company having an over-the-counter stock, having a relatively thin "issue" and necessitating a future course of purchases over such period of time as said SYDNEY M. EISENBERG shall see fit.

IN WITNESS THEREOF, this Consent in writing by the undersigned Directors is to be filed as part of

the minutes of SHORELAND MANOR CO. the day and year first above written.

/s/ Sydney M. Eisenberg
/s/ Margaret Fork
/s/ Miriam L. Eisenberg

CONSENT OF DIRECTORS
of
SHORELAND MANOR CO.
March 31, 1965

The undersigned, being all of the directors of the SHORELAND MANOR CO., a Wisconsin corporation, acting pursuant to §180.91 of the Wisconsin Business Corporation Law, hereby unanimously consent to the adoption of the following resolutions, such resolutions to have the same force and effect as if adopted unanimously at a meeting of Directors of the corporation duly convened March 31, 1965.

RESOLVED that since SYDNEY M. EISENBERG is the only stockholder in the SHORELAND MANOR CO., a Wisconsin corporation, he hereby waives the sending of notice to himself, and the Directors also waive notice of hearing, and consent to having an immediate meeting of the Directors of said corporation for the purpose of effecting the matters hereafter to be resolved at this meeting.

RESOLVED that SYDNEY M. EISENBERG, the President of SHORELAND MANOR CO., a Wisconsin corporation, is the sole stockholder in said corporation and certain funds are, as of this date, March 31, 1965, becoming available for investment purposes on behalf of the corporation.

FURTHER, BE IT RESOLVED that SYDNEY M. EISENBERG be authorized to purchase common stocks, bonds, debentures, and/or any other types of investments so as to offset the tremendous losses suffered by this corporation. SYDNEY M. EISENBERG being the sole stockholder, attorney for the corporation and president of the corporation, is duly authorized to place said stocks in his own name, for his own convenience and concluding purchases and sales providing, however, that he shall report all gains or losses to the corporation, and providing further, that it is AGREED and UNDERSTOOD that the transfer of the stock into his name is made for the purpose of the corporation for the purposes benefitting said corporation because said corporation is direly in need of the gains to offset the financial losses of the corporation. All such gains and losses are on behalf of and belong to the corporation, not SYDNEY M. EISENBERG.

SYDNEY M. EISENBERG, further, by virtue of his experience and knowledge of the machine tool industry, as attorney for one or more of the labor unions operating in this area, said SYDNEY M. EISENBERG, having further, full confidence in the future of the automated machine tool industry, is further expressly authorized to make purchases on behalf of the corporation in his own name, and in his own accounts, all on behalf of said corporation, in the Gisholt Machine Company of Madison, Wisconsin, said company having an over-the-counter stock, having a relatively thin "issue" and necessitating a future course of purchases over such period of time as said SYDNEY M. EISENBERG shall see fit.

IN WITNESS WHEREOF, this consent in writing by the undersigned shareholders is to be filed as part of the minutes of SHORELAND MANOR Co. the day and year above written.

/s/ Sydney M. Eisenberg
Sole Stockholder

CONSENT OF STOCKHOLDERS
of
PROSPECT HEIGHTS CO.
March 31, 1965

The undersigned, being all of the shareholders of PROSPECT HEIGHTS CO., a Wisconsin corporation, acting pursuant to §180.91 of the Wisconsin Business Corporaton Law, hereby unanimously consent to the adoption of the following Resolutions, such Resolutions to have the same force and effect as if adopted unanimoulsy at a meeting of Shareholders of the Corporation duly convened March 31, 1965.

RESOLVED: That since SYDNEY M. EISENBERG is the only stockholder in the PROSPECT HEIGHTS CO., a Wisconsin corporation, he hereby waives the sending of notice to himself and consents to having an immediate meeting of the Shareholders for the purpose of effecting the matters hereafter to be resolved at this meeting.

RESOLVED: That SYDNEY M. EISENBERG, the President of PROSPECT HEIGHTS CO., a Wisconsin corporation, is the sole stockholder in said PROSPECT HEIGHTS CO., and certain funds are, as of this date, March 31, 1965, becoming available for investment purposes on behalf of the Corporation.

FURTHER, BE IT RESOLVED: That SYDNEY M. EISENBERG be authorized to purchase common stocks, bonds, debentures and/or any other types of investments so as to offset the tremendous losses suffered by this Corporation. SYDNEY M. EISENBERG being the sole stockholder, attorney for the Corporation and President of the Corporation, is duly authorized to place said stocks in his own name, for his own convenience, and concluding purchases and sales, providing, however, that he shall report all gains or losses to the Corporation, and providing further, that it is AGREED and UNDERSTOOD that the transfer of the stock into his name is made for the purpose of the Corporation for the purposes benefiting said corporation because said corporation is direly in need of the gains to offset the financial losses of the Corporation. All such gains and losses are on behalf of and belong to the corporation and not SYDNEY M. EISENBERG. SYDNEY M. EISENBERG, further, by virtue of his experience and knowledge of the machine tool industry, as attorney for one or more of the labor unions operating in this area, said SYDNEY M. EISENBERG, having further, full confidence in the future of the automated machine tool industry, is further expressly authorized to make purchases on behalf of the corporation in his own name, and in his own accounts, all on behalf of said Corporation, and with preference toward the purchase of stock in the Gisholt Machine Company of Madison, Wisconsin, said company having an over-the-counter stock, having a relatively thin "issue" and

necessitating a future course of purchases over such period of time as said SYDNEY M. EISENBERG shall see fit.

IN WITNESS WHEREOF, thic consent in writing by the undersigned shareholders is to filed as part of the minutes of PROSPECT HEIGHTS CO. the day and year above written.

/s/ Sydney M. Eisenberg
Sole Stockholder

CONSENT OF DIRECTORS
of
PROSPECT HEIGHTS CO.
March 31, 1965

The undersigned, being all of the directors of PROSPECT HEIGHTS CO., a Wisconsin corporation, acting pursuant to §180.91 of the Wisconsin Business Corporation Law, hereby unanimously consent to the adoption of the following Resolutions, such Resolutions to have the same force and effect as if adopted unanimously at a meeting of Directors of the Corporation duly convened March 31, 1965.

RESOLVED: That since SYDNEY M. EISENBERG is the only stockholder in the PROSPECT HEIGHTS CO., a Wisconsin corporation, he hereby waives the sending of notice to himself and consents to having an immediate meeting of the Directors for the purpose of effecting the matters hereafter to be resolved at this meeting.

RESOLVED: That SYDNEY M. EISENBERG, the President of PROSPECT HEIGHTS CO., a Wisconsin corporation, is the sole stockholder in said

PROSPECT HEIGHTS CO., and certain funds are, as of this date, March 31, 1965, becoming available for investment purposes on behalf of the Corporation.

FURTHER, BE IT RESOLVED: That SYDNEY M. EISENBERG be authorized to purchase common stocks, bonds, debentures and/or any other types of investments so as to offset the tremendous losses suffered by this Corporation. SYDNEY M. EISENBERG being the sole stockholder, attorney for the Corporation and President of the Corporation, is duly authorized to place said stocks in his own name, for his own convenience, and concluding purchases and sales, providing, however, that he shall report all gains or losses to the Corporation, and providing further, that it is AGREED and UNDERSTOOD that the transfer of the stock into his name is made for the purpose of the Corporation for the purposes benefiting said corporation because said corporation is direly in need of the gains to offset the financial losses of the Corporation. All such gains and losses are on behalf of the corporation and belong to it, not SYDNEY M. EISENBERG. SYDNEY M. EISENBERG, further, by virtue of his experience and knowledge of the machine tool industry, as attorney for one or more of the labor unions operating in this area, said SYDNEY M. EISENBERG, having further, full confidence in the future of the automated machine tool industry, is further expressly authorized to make purchases on behalf of the corporation in his own name, and in his own accounts, all on behalf of said Corporation, and with preference toward the purchase of stock in the Gisholt Machine Company of Madison,

Wisconsin, said company having an over-the-counter stock, having a relatively thin "issue" and necessitating a future course of purchases over such period of time as said SYDNEY M. EISENBERG shall see fit.

IN WITNESS WHEREOF, this consent in writing by the undersigned directors is to be filed as part of the minutes of PROSPECT HEIGHTS CO. the day and year first above written.

/s/ Sydney M. Eisenberg
/s/ Miriam L. Eisenberg
/s/ Margaret Folk

Being all of the Directors of said PROSPECT HEIGHTS CO., a Wisconsin corporation.

LIST OF WITNESSES AND EXHIBITS

Note how the IRS Cleverly Misrepresented by Inference that the Eisenberg records were personal records rather than the law firm full of employees who prepared records.

W 1 — Representative of Director, Kansas City Service Center, Kansas City, MO

Ex. 1-8 — Income tax returns of SYDNEY M. and MIRIAM EISENBERG for the years 1964, 1966, 1967, 1968, 1969, 1970 Amended, and 1971.

Ex. 9 and 10 — Partnership return of income of EISENBERG, KLETZKE & EISENBERG for the year 1970 and 1971.

Ex. 11-17 — Income tax returns of SHORELAND MANOR CO. for the fiscal years ended February 28, 1965, 1966, 1967, 1968, 1969, 1970, and 1971.

Ex. 18-24 — Income tax returns of PROSPECT HEIGHTS CO. for the years 1964, 1965, 1966, 1967, 1968, 1969, and 1970.

Ex. 25 — Form 4340, Certificate of Assessments & Payments, relative to returns filed by SYDNEY M. and MIRIAM EISENBERG for the calendar years 1964 through 1972.

W 2 — TERRENCE P. KELLY, Internal Revenue Agent, Milwaukee, WI

Ex. 1 — Memorandums of his contacts with EISENBERG.

Ex. 2 — Revenue Agent's Report, 1966-70, SYDNEY M. and MIRIAM EISENBERG.

Ex. 3 — Letter of consent of Directors of PROSPECT HEIGHTS CO. authorizing SYDNEY M. EISENBERG to place said stocks in his own name.

Ex. — List by KELLY requesting denoted invoices to be furnished along with statements from RICHARD CATES.

W 3 — EDWARD R. SCHWALBACH, Special Agent (now retired, 3256 S. 23rd Street, Milwaukee)

Ex. 1 — Memorandum of interview conducted 10-14-71 with EISENBERG.

Ex. 2 — Memorandum of interview conducted 11-1-71 with LESTER RAKITA.

Ex. 3 — Memorandum of interview conducted 11-11-71 with EISENBERG.

Ex. 4 — Memorandum of telephone conversation conducted 6-16-72 with PAUL LIPTON.

W 4 — ROBERT A. UBBELOHDE, Special Agent Internal Revenue Service, Milwaukee, WI

Ex. 1 — Powers of attorney dated 6-15-72 authorizing PAUL P. LIPTON and RICHARD A. PETRIE to represent EISENBERG. Also powers of attorney dated 10-12-72 authorizing JOHN A. ZERBEL and PAUL L. RUNKEL to represent him.

Ex. 2 — Memorandum of conversation with EISENBERG on 11-1-73.

Ex. 3 — Memorandum of conversation with JOHN A. ZERBEL on 1-15-73.

Ex. 4 — Memorandum of conversation with JOHN A. ZERBEL on 2-12-73.

Ex. 5 — Memorandum of interview with JOHN ZERBEL on 10-25-73.

Ex. 6 — Memorandum of conversation with JOHN ZERBEL on 11-20-73 and workpapers received from ZERBEL.

Ex. 7 — Memorandum of conversation with BURTON LEVINE on 10-15-73.

Ex. 8 — Memorandum of conversation with BURTON LEVINE on 10-16-73.

Ex. 9 — Schedule of Legal fees deducted as "Business Expenses" by EISENBERG.

Ex. 10 — Copies of EISENBERG's general ledger and cancelled checks relating to legal fees produced by JOHN A. ZERBEL.

Ex. 11 — Schedule of business and personal interest expenses.

Ex. 12 — Copies of EISENBERG's general ledger and cancelled checks relating to interest expense produced by CPA ZERBEL.

Ex. 13 — Copies of EISENBERG's bank statements and cancelled checks relating to payment of court costs to the Supreme Court of the State of Wisconsin.

Ex. 14 — Copy of EISENBERG's cash disbursements journal for 1971 expenses recorded in 1970 and relating to the amended return for 1970 produced by JOHN A. ZERBEL.

Ex. 15 — Schedule of transactions in the stock of HERCULES GALION PRODUCTS, INC. (PEABODY GALION CORP.)

Ex. 16 — Schedule of transactions in the stock of GIDDINGS & LEWIS, INC. (GISHOLT CORP.)

Ex. 17 — Schedule of transactions in the stock of BANKERS UTILITIES CORP. (BANKERS DISPATCH CORP.)

Ex. 18 — Schedule of transactions in the stock of ALL STAR INSURANCE CORP.

Ex. 19 — Schedule of transactions in the stock of INTERNATIONAL PRODUCTS CORP. and OGDEN CORP.

Ex. 20 — Schedule of expenses claimed in year prior to year incurred and allowable.

Ex. 21 — Copies of cancelled checks issued by EISENBERG in payment of expense items expensed in wrong year produced by JOHN A. ZERBEL.

Ex. 22 — Copies of year-and cancelled checks, bank analysis and reconciliations for LANEIL MANAGEMENT CO. produced by JOHN A. ZERBEL.

Ex. 23 — Copies of year-end cancelled checks, bank analysis, and reconciliations for EISENBERG produced by JOHN A. ZERBEL.

Ex. 24 — Schedule with copies of cancelled payroll checks produced by JOHN A. ZERBEL.

Ex. 25 — Schedule of 1971 expenses, verified by third party records, which were deducted in 1970 and adjusted on the amended returns for 1970.

Ex. 26 — Copies of cancelled checks issued by EISENBERG in payment of 1971 expenses but deducted in 1970, produced by JOHN A. ZERBEL.

Ex. 27 — Copy of cancelled check issued to THE MARSHAL CO. for the purchase of GISHOLT CORP. stock produced by JOHN A. ZERBEL.

Ex. 28 — Schedule of source of funds for EISENBERG's account at DOUGLAS SECURITIES, INC.

Ex. 29 — Newspaper clippings concerning EISENBERG's disbarment hearings and appeals.

Ex. 30 — Personal resume and statement on investment in high rises authored by EISENBERG.

Ex. 31 — Transcript of Account No. 49513 at MUTUAL SAVINGS & LOAN ASSOCIATION OF WISCONSIN.

Ex. 32 — Transcript of tax returns of PROSPECT HEIGHTS CO. for the years 1964 through 1971.

Ex. 33 — Transcript of tax returns of SHORELAND MANOR CO. for the years 2-28-65 through 2-28-71.

Ex. 34 — Letter concerning transfer of INTERNATIONAL PRODUCTS CO. stock.

Ex. 35 — Statement of disposition of loan proceeds, FIRST NATIONAL BANK OF LINCOLNWOOD.

Ex. 36 — Cancelled check given in payment for certain stock purchases by EISENBERG.

Ex. 37 — Documentation concerning transactions between EISENBERG and PROSPECT HEIGHTS and SHORELAND MANOR to the purchase of INTERNATIONAL PRODUCTS STOCK.

Ex. 39 — Memorandum of telephone conversations with JOHN A. ZERBEL on October 19, 1973.

W 5 — CHARLES H. HOWE, Group Manager
Intelligence Division, Internal Revenue Service, Milwaukee, WI

Ex. 1 — Memorandum of telephone conversation on 11-1-73 with EISENBERG.

W 6 — ANGELA BIRO, 8040 Shantung Drive, Santee, California

Ex. 1 — Affidavit relating to her employment as a bookkeeper by EISENBERG dated 10-29-73.

W 7 — MABEL PETERSON, 770 N. Marshall Street, Milwaukee, WI

Ex. 1 — Question and Answer Statement taken 11-13-73 concerning her duties as a bookkeeper in EISENBERG's office.

W 8 — IRENE WIECZOREK, 1013 S. Layton Blvd., Milwaukee, WI

Ex. 1 — Affidavit dated 11-8-73, relating to her duties as an employee of EISENBERG, particularly those involving securities transactions.

W 9 — BURTON H. LEVINE, CPA, 4838 N. Newhall Milwaukee, WI

Ex. 1 — Question and Answer Statement taken 10-26-73, relating to services performed by LEVINE for EISENBERG.

Ex. 2 and 3 — Copies of EISENBERG's Federal Income Tax Returns, Forms 1040, for 1963 and 1965.

Ex. 4-12 — Workpapers used in preparation of EISENBERG's Federal Income Tax Returns for the years 1964 through 1971.

Ex. 13 — Schedule of acquisitions of stock of ALL-STAR INSURANCE CORP.

Ex. 14 — Transfer record, correspondence, and workpapers concerning transactions in the stock of GISHOLT MACHINES.

Ex. 15 — Workpapers and copies of documents relating to EISENBERG's transactions in INTERNATIONAL PRODUCTS Stock.

Ex. 16 — Letter from EISENBERG to LEVINE to make certain that no checks charged to 1971 reflect services allocable to 1972.

W10 — EDWARD GILLMAN, CPA, 8825 W. Herbert, Ave., Milwaukee, WI

Ex. 1 — Affidavit and attachments dated 11-21-73, relating to services performed for EISENBERG by GILLMAN.

Ex. 2 — Correspondence concerning transactions in the stock of GISHOLT MACHINES.

W11 — RICHARD L. CATES, 5401 Hammersly Road, Madison, WI

Ex. 1 — Affidavit and attachments dated 11-14-73 relating to charges to and payments by EISENBERG for services rendered by CATES.

W12 — ROSELYN JOHNSON, 2822 Lakeland Avenue, Madison, WI

Ex. 1 — Affidavit and attachments dated 11-14-73 relating to billing to and payment by EISENBERG to CATES, her employer.

W13 — FRANKLIN W. CLARKE, 4514 Hammersly Rd., Apt. 7, Madison, WI

Ex. 1 — Affidavit dated 10-26-73 relating to payment of costs to the Wisconsin Supreme Court by EISENBERG in connection with disbarment proceedings against him.

Ex. 2 — Record of SUPREME COURT OF THE STATE OF WISCONSIN concerning disbarment proceedings against EISENBERG and costs assessed and paid relative to that action.

Please Note — Government falsehood — it was a suspension not a disbarment as frequently stated.

W14 — Rep. of AMERICAN CITY BANK & TRUST CO. 740 N. Plankinton Ave., Milwaukee, WI

Ex. 1 — Direct Liability Ledger for Account 7-07-166-3 of SYDNEY M. EISENBERG for the years 1966, 1967, 1968, 1969, 1970 and 1971.

W15 — ANTHONY J. VASQUEZ, FIRST NATIONAL BANK OF LINCOLNWOOD, 6401 N. Lincoln Ave., Lincolnwood, IL

Ex. 1 — Affidavit dated 9-6-73 relating to receipt of interest payments from EISENBERG.

Ex. 2 — Liability ledger for Account of SYDNEY M. EISENBERG, participating ledgers, and cashier's checks No. 79860, 79859, and 79858 relating to loans for the years 1966 through 1971.

W16 — Rep. of DEVON BANK, 6445 N. Western Av., Chicago, IL

Ex. 1 — Liability ledger for account of SYDNEY EISENBERG for the years 1967, 1968, 1969, and 1970.

W17 — Rep. of BANK OF COMMERCE, 515 W. Wells St., Milwaukee, WI

Ex. 1 — Direct liability ledger for account of SYDNEY M. EISENBERG for the years 1966, 1967, 1968, 1969, 1970, and 1971.

W18 — Rep. UPPER AVENUE NATIONAL BANK OF CHICAGO, 923 N. Michigan Ave., Chicago, IL

Ex. 1 — Liability ledger for account of SYDNEY M. EISENBERG for the years 1966, 1967, 1968, 1969, 1970, and 1971.

Ex. 2 — Statement for Account No. 2066270 for the period ended 4-30-66 in the name of SYDNEY M. EISENBERG.

W19 — Rep. ASHLAND STATE BANK, 9443 S. Ashland Ave., Chicago, IL

Ex. 1 — Liability ledger for account of SYDNEY M. EISENBERG for the years 1966, 1967, 1968, 1969, 1970, and 1971.

Ex. 2 — Bank statements for account No. 24-701-5 of SYDNEY M. EISENBERG for months of April and May, 1966.

Ex. 3 — Liability ledger for account of EISENBERG disclosing loan which was source of deposit to checking account No. 24-701-5 at ASHLAND STATE BANK.

W20 — Rep. BANK OF RAVENSWOOD, 1825 W. Lawrence Ave., Chicago, IL

Ex. 1 — Liability ledger for account of SYDNEY M. EISENBERG for the years 1970 and 1971.

W21 — Rep. M & I NORTHERN BANK, 3536 W. Fond du Lac Ave., Milwaukee

Ex. 1 — Mortgage ledger for Note No. 25564, SYDNEY M. and MIRIAM L. EISENBERG, Mortgagors, for the years 1965, 1966, 1967, 1968, 1969, 1970, and 1971.

Ex. 2 — Liability ledger for account of SYDNEY M. EISENBERG for the years 1970 and 1971.

Ex. 3 — Installment Loan Account ledgers for Note 71772 for the years 1966, 1967, 1968, and 1969; and Note 95110 for the years 1969, 1970, and 1971.

W22 — Rep. FIRST WISCONSIN NATIONAL BANK OF MILWAUKEE, 777 E. Wisconsin Ave., Milwaukee

Ex. 1 — Direct liability ledger for account of SYDNEY M. EISENBERG for the years 1968, 1969, 1970, and 1971.

W23 — Rep. MILWAUKEE COUNTY BANK, 7000 W. Greenfield Ave., West Allis

Ex. 1 — Liability ledger for account of SYDNEY M. EISENBERG for the years 1970 and 1971.

W24 — Rep. of MUTUAL SAVINGS & LOAN ASSN. OF WISCONSIN

Ex. 1 — (See W4-31 for transcript of account No. 49513)

W25 — FIRST FEDERAL SAVINGS & LOAN ASSN. OF WISCONSIN, 200 E. Wisconsin Ave, Milwaukee

Ex. 1 — Records of interest received from EISENBERG during 1966, 1967, 1968, 1969, 1970, and 1971 on Accounts No. 12626 and 63109.

Ex. 2 — Records of interest received on loan No. 18659 during 1970 and 1971.

W26 — WILLIAM K. LANE, Ass't Mgr., Comptroller's Dept., NEW YORK LIFE INSURANCE CO., 51 Madison Ave., New York, NY

Ex. 1 — Letter dated 10-11-73 relating the transactions affecting policy No. 22-725-530 for the years 1965, 1966, 1967, and 1968.

Ex. 2 — Cash Value Statement concerning the cancellation of Policy No. 22725530 on 1-21-69.

W27 — KIRK L. MacKINNON, Ass't. Council, BANKERS LIFE COMPANY, 711 High St., Des Moines, IA

Ex. 1 — Itemized Loan Statement on policy No. 1703723 dated 8-29-72, for the years 1966, 1967, 1968, 1969, 1970, 1971,and 1972.

W28 — Rep., FIRST WISCONSIN TRUST CO., 777 E. Wisconsin Ave., Milwaukee

Ex. 1 — Stockholder ledger cards for common stock and warrants of ALL-STAR INSURANCE CORP. in the name of EISENBERG.

Ex. 2 — Check No. C146622, dated 9-10-65 payable to EISENBERG for tender of 1,407 shares of ALL-STAR INSURANCE CORP. stock.

Ex. 3 — Letter dated 8-17-62 summarizing the transactions in EISENBERG's name.

Ex. 4 — Transfer book re ALL-STAR INSURANCE CO. concerning the transfer of 2,050 shares.

W29 — R. D. SOMMERFIELD, Assistant Secretary, ALL-STAR INSURANCE CORP.
5401 N. 76th St.

Ex. 1 — Stockholder ledger cards for common stock and warrants of ALL-STAR INSURANCE CORP. in the name of EISENBERG.

Ex. 2 — Stock certificate issued to EISENBERG of ALL-STAR INSURANCE CORP. and related correspondence.

W30 — JOHN CISTERNINO, Vice-Pres., WALSTON & COMPANY, 77 Water St., New York, NY

Ex. 1 — Brokerage statements in the name of SYDNEY M. EISENBERG (Acc't. No. 74-00-099) reflecting transactions involving GISHOLT CORP. — GIDDINGS LEWIS MACHINE stock.

Ex. 2 — Brokerage statements in the name of SYDNEY M. EISENBERG (Acc't. No. 74-00-099 and No. 74-13-865) and PROSPECT HEIGHTS (Acc't. No. 74-07-968) reflecting transactions involving INTERNATIONAL PRODUCTS CORP. — OGDEN CORP. stock.

Ex. 3 — Brokerage statements in the name of SYDNEY M. EISENBERG (Acc't. No. 74-00-099) reflecting transactions involving ALL-STAR INSURANCE.

Ex. 4 — Brokerage statements for Account No. 74-00-099 dated 7-30-65 and 10-29-65 reflecting source of funds from sale of GISHOLT CORP. stock.

Ex. 5 — Brokerage statements in the name of SYDNEY MICHAEL EISENBERG (Acc't No. 74-13-865) reflecting sales of stocks in January of 1971.

W31 — LEE A. ROWE, MARSHALL CO., 111 E. Wisconsin Ave., Milwaukee

Ex. 1 — Affidavit dated 12-5-73 and broker's statement concerning the purchase of 100 GISHOLT CORP. stock on 4-1-66.

W32 — JACK AHRENS, Office Manager, ILLINOIS CO., INC., 135 S. La Salle St., Chicago, IL

Ex. 1 — Brokerage statement in the name of SHORELAND MANOR CO. (Acc't. No. 50-792616-1) reflecting sale of BANKERS UTILITIES stock.

W33 — JUNE E. CARLSON, Treasurer, LINK, GORMAN, PECK & CO., 208 S. La Salle St., Chicago, IL

Ex. 1 — Confirmation of purchase of HERCULES GALION PRODUCTS stock.

Ex. 2 — Correspondence concerning purchase of HERCULES GALION PRODUCTS stock by EISENBERG and transfer to his name, along with stock dividends thereon.

W34 — ROY SCHAEFER, HORNBLOWER & WEEKS, 72 W. Adams, Chicago, IL

Ex. 1 — Brokerage statement for SYDNEY M. EISENBERG (Acc't. No. 40-30051) reflecting purchase of HERCULES GALION stock.

Ex. 2 — Brokerage statement and advice for draft re payment for HERCULES GALION stock.

W35 — H. LARSON, HAYDEN, STONE EQUITIES, 79 Pine St., New York, NY

Ex. 1 — Brokerage statement in the name of SYDNEY M. EISENBERG (Acc't. No. H8-3544-426) reflecting purchase of OGDEN stock.

W36 — JOHN B. RICHARDSON, Counsel, BLAIR & CO., INC., 1099 Wall St. West, Lyndhurst, NJ

Ex. 1 — Monthly broker's statements for Acc't. No. 24-65361 for periods ending 9-30-65 and 10-29-65 reflecting purchase of HERCULES GALION PRODUCTS.

Ex. 2 — Correspondence from FIRST NATIONAL BANK OF LINCOLNWOOD concerning the acquisition of HERCULES GALION PRODUCTS.

W37 — JAMES HOSTY, BACHE & CO., 740 N. Water St., Milwaukee

Ex. 1 — Monthly broker's statement for Acc't. No. 05-17403 for period ending 5-25-67 reflecting purchase of BANKERS DISPATCH CORP. stock.

Ex. 2 — Monthly broker's statement for Acc't. No. 05-17403 for the period ending 8-31-67 reflecting the purchase of ALL-STAR INSURANCE CORP. stock.

W38 — STERLINE LANIER, Operations Mgr., REYNOLDS SECURITIES, INC., 150 S. Wacker Dr., Chicago, IL

Ex. 1 — Monthly broker's statements for Acc'ts. No. 64-3754-54 for period Nov., 1969; No. 69-7090-97 for period Sept. 30, 1970; No. 69-7090-55 for period Oct. 31, 1970, reflecting transactions in OGDEN CORP. stock.

Ex. 2 — Monthly broker's statements for Acc't. No. 63-0031-54 dated 11-30-68 and No. 64-3754-54 dated 10-31-68 reflecting transactions in BANKERS UTILITIES CORP.

Ex. 3 — Monthly broker's statement for Acc't. No. 64-3754-54 dated 9-30-68 reflecting sales of HERCULES GALION PRODUCTS stock.

W39 — STEVEN EDWARDS, Partner, WILLIAM A. SULLIVAN, Cashier, LANGILL & CO., 134 S. La Salle St., Chicago, IL

Ex. 1 — Confirmations reflecting sale of GIDDINGS & LEWIS stock by ASHLAND STATE BANK for the account of EISENBERG on 4-5-67 and 7-14-67.

W40 — HELEN LEONARD, MERRILL, LYNCH, PIERCE, FENNER & SMITH, 141 W. Jackson, Chicago, IL

Ex. 1 — Broker's statements for Acc't. No. 625-22800 dated 1-27-67, 4-28-67, 7-28-67; Acc't. No. 74-00-099 dated 4-28-67; reflecting transactions in GIDDINGS & LEWIS CO. stock.

Ex. 2 — Broker's statements for Acc'ts. No. 625-07482 dated 1-27-67, No. 625-22800 dated 1-27-67, and No. 663-53563 dated 12-31-70 reflecting transactions in OGDEN CORP. stock.

Ex. 3 — Broker's statements for Acc'ts. No. 625-22800 dated 5-26-67 and 12-29-67 and No. 625-07482 dated 12-29-67 reflecting transactions in HERCULES GALION PROD. stock.

W41 — ANTHONY PARTIPILO, Vice-Pres., ROTHSCHILDS SECURITIES CORP., 135 S. La Salle, Chicago, IL

Ex. 1 — Broker's statement for Acc't. No. 50-227-587-1 dated 4-29-66 reflecting purchase of GISHOLT CORP. stock.

Ex. 2 — Broker's statements for Acc'ts. No. 50-227587-1 dated 3-26-65 and 11-26-65, No. 50-798709-1 dated 2-23-68, and No. 50-707082-1 dated 2-23-68 reflecting transactions in OGDEN CORP. stock.

Ex. 3 — Broker's statement for Acc't. No. 50-2275871-1 dated 4-28-67 reflecting purchase of BANKERS DISPATCH CORP. stock.

Ex. 4 — Broker's statement for Acc't. No. 50-227587-1 dated 9-24-65 reflecting purchase of HERCULES GALION PRODUCTS stock.

W42 — WILLIAM T. PALIOTTE, Accounting Manager, DOUGLAS STEWART, INC., 35 Professional Park, Farmington, CT

Ex. 1 — Ledger account statements in the name of SYDNEY M. EISENBERG reflecting transactions involving GISHOLT MACHINE stock.

Ex. 2 — Ledger account statements in the names of SYDNEY M. EISENBERG and SHORELAND MANOR CO. reflecting transactions involving INTERNATIONAL PRODUCTS stock.

Ex. 3 — Ledger account statements in the name of SYDNEY M. EISENBERG reflecting transactions involving BANKERS DISPATCH stock.

Ex. 4 — Ledger account statements in the name of SYDNEY M. EISENBERG reflecting transactions involving HERCULES GALION PRODUCTS stock.

Ex. 5 — Ledger statements in the names of SYDNEY M. EISENBERG and SHORELAND MANOR reflecting the transfer of funds.

Ex. 6 — Letter acknowledging transfer of funds from the account of SHORELAND MANOR CO. to the account of SYDNEY M. EISENBERG.

Ex. 7 — Ledger account 1-26-66 through 5-27-66 relating to the source of funds in the account.

W43 — MILTON ZEITLIN, REPUBLIC PAINT DISTRIBUTING CO., 3110 W. Meinecke Ave., Milwaukee, WI

Ex. 1 — Affidavit dated 11-26-73 relating to payments received from EISENBERG in 1970 and 1971, and accounts receivable ledger cards in the name of LANEIL MANAGEMENT CO. for 1969, 1970, and 1971.

W44 — JOHN B. SCHAFER, AETNA LIFE & CASUALTY CO., Suite 100, 622 N. Cass St., Milwaukee, WI

Ex. 1 — Affidavit dated 11-20-73 concerning premiums paid on Policy No. 15047, and monthly premium statement for February, 1971. Agent — Wisconsin Compensation POO.

W45 — JOHN McKANE, NATIONAL CASH REGISTER CO., 10723 W. North Ave., Wauwatosa, WI

Ex. 1 — Affidavit dated 11-26-73 relating to payment received from EISENBERG for 1971 maintenance agreement, and Invoice No. 23726125 billing for 1971 maintenance agreement. Also letter from EISENBERG concerning the performance under the agreement.

W46 — JAMES JESSE, WISCONSIN ELECTRIC POWER CO., 231 W. Michigan St., Milwaukee, WI

Ex. 1 — Schedule of billings, receipts, and dates of service in connection with checks issued by LANEIL MANAGEMENT CO. dated December, '69, and December, '70.

W47 — MARGARET J. STEWART, 4002 Highway G Dousman, WI

Ex. 1 — Affidavit dated 11-27-73 concerning the sublease of the property at 3990 Highway GG, Dousman, Wisconsin, to NEIL EISENBERG.

W48 — JAMES E. WEAVER, NEWSPAPER, INC., 333 W. State St., Milwaukee, WI

Ex. 1. — Affidavit dated 11-26-73 relating to payments received by the JOURNAL CO. from LANEIL MANAGEMENT CO., and Invoices to LANEIL MANAGEMENT CO. for the months of Dec., '69, Jan., '70, Nov., '70, Dec., '70, Jan., '71 Feb. '71 and Mar., '71.

W49 — Representative, THE GILMAN PRESS, 821 Williamson St., Madison, WI

Ex. 1 — Affidavit dated 12-5-73 and related documents concerning printing done for EISENBERG.

W50 — ELAINE REID, CAMPUS PRINTING CO., INC. 3906 Meyer Ave., Madison, WI

Ex. 1— Affidavit dated 12-7-73 and attached documents concerning printing done for EISENBERG.

W51 — WISCONSIN TELEPHONE CO. 722 N. Broadway, Milwaukee, WI

Ex. 1 — Schedule of billings and payments received during 1970 and 1971.

W52 — LEONARD NAESER, MILWAUKEE WATER WORKS, 841 N. Broadway, Milwaukee, WI

Ex. 1 — Summary of billings paid by LANEIL MANAGEMENT CO. with checks dated Dec., 1969 and Dec., 1970.

W53 — MARTIN HABENICHT, WISCONSIN GAS CO., 606 E. Wisconsin Ave., Milwaukee, WI

Ex. 1 — Summary of billings paid by LANEIL MANAGEMENT CO. with checks dated Dec., 1969 and Dec., 1970.

W54 — STANLEY GRIES, CENTER STREET FUEL CO., 3015 W. Center St., Milwaukee, WI

Ex. 1 — Account history list re LANEIL MANAGEMENT CO. for the years 1969, 1970, and 1971.

W55 — STEVEN M. BRUNN, HEIN ELECTRIC SUPPLY CO., 1445 N. 5th St., Milwaukee, WI

Ex. 1 — Affidavit dated 11-23-73 concerning the payment received from LANEIL MANAGEMENT CO. on 4-10-73, and accounts receivable ledger cards in the name of LANEIL MANAGEMENT for the period 11-19-70 through 4-27-71.

W56 — JOHN S. PYEATT, COERPER LUMBER CO., 2161 N. 30th St., Milwaukee, WI

Ex. 1 — Affidavit dated 11-26-73 concerning payments received from LANEIL MANAGEMENT CO. on 3-8-71. Invoices to SYDNEY M. EISENBERG for the month of February, 1971. Accounts receivable ledger card in the name of EISENBERG. Cash receipts journal for 3-8-71 disclosing receipt from EISENBERG.

W57 — LEN E. GORE, OTIS ELEVATOR CO., 10506 W. Bluemound Rd., Milwaukee, WI

Ex. 1 — Affidavit dated 11-30-73 relating to services rendered to EISENBERG in 1971. Service order records for sales on 3-24-71, 3-25-71, and 1-22-71. Also a service order dated 1-22-71.

W58 — HAROLD O. HAISSIG, HAISSIG, INC. 3110 E. Allerton Ave., Milwaukee, WI

Ex. 1 — Affidavit dated 11-27-73 concerning checks received from LANEIL MANAGEMENT CO. in Feb., 1971, and Mar., 1971. Invoice No. 020211 dated 2-2-71 for repairs at 770 N. Marshal St. Cash receipts journal for 2-10-71 listing receipt of payment from EISENBERG.

W59 — SAMUEL SLOANE, SLOANE'S FURNITURE CO. 1425 N. 12th St., Milwaukee, WI

Ex. 1 — Affidavit dated 12-4-73 relating to sales to EISENBERG and collections from him. Invoices for sales to LANEIL MANAGEMENT CO. and ALAN EISENBERG during Dec., 1970, and Jan., 1971, Feb., 1971, and Mar., 1971.

W60 — GEORGE A. DEUEL, AMERICAN PLUMBING SUPPLY CO., 1501 N. 3rd Street, Milwaukee, WI

Ex. 1 — Affidavit dated 11-23-73 concerning payments received from LANEIL MANAGEMENT CO. during 1970 and 1971. Accounts receivable ledger cards for Dec., '69, Jan., '70, Dec., '70, Jan., '71, Feb., '71, and Mar., '71 for LANEIL MANAGEMENT CO.

W61 — ROGER Y. POKRASS, SECURITIES INDUSTRIES, INC., 2560 N. 32nd Street, Milwaukee, WI

Ex. 1 — Affidavit dated 12-3-73 relating to sales to and receipts from EISENBERG. Invoices for installation at 3901 N. Lake Drive, and sales contract for that installation.

W62 — DOLORES STATS, VILLAGE OF SHOREWOOD, 3930 N. Murray Ave., Shorewood, WI

Ex. 1 — Affidavit concerning property taxes of EISENBERG's residence at 3901 N. Lake Drive.

W63 — Representative, CENTRAL NATIONAL BANK, 120 S. La Salle St., Chicago, IL

Ex. 1 — Transfer agent's record of stock of BANKERS UTILITIES CORP. owned by EISENBERG.

W64 — Representative, NATIONAL BANK OF CHICAGO, One First National Plaza, Chicago, IL

Ex. 1 — Stock transfer record of GISHOLT CORP. held by SYDNEY EISENBERG.

W65 — FERDINAND DeRUBEIS, MARINE MIDLAND BANK, 125 Barclay St., New York, NY

Ex. 1 — Letter dated 9-13-72 and ledger card concerning EISENBERG's holdings in HERCULES GALION stock.

W66 — G. H. GEANOPULAS, Stock Transfer Section, MELLON BANK N.A., Mellon Square, Pittsburgh, PA

Ex. 1 — Letter and transcript of common stock account reflecting transfer of stock.

W67 — ROBERT L. STRENGE, Assistant Secretary, THE WASHINGTON WATER POWER CO., P. O. Box 1445, Spokane, WA

Ex. 1 — Letter acknowledging transfer of stock.

W68 — Representative, FIRST NATIONAL BANK AT CHICAGO, Corporate Trust Division 38 South Dearborn St., Chicago, IL

Ex. 1 — MIRIAM EISENBERG's authorization of January 7, 1969.

E. 2 — Letter acknowledging transfer of stock.

W69 — Representative, FIRST NATIONAL BANK OF JERSEY CITY, Jersey City, NJ

Ex. 1 — MIRIAM EISENBERG's authorization of January 6, 1969, along with corporate resolution.

W70 — J. W. REED, Assistant Treasurer, ILLINOIS STOCK TRANSFER CO., 223 W. Jackson Blvd., Chicago, IL

Ex. 1 — Letter of August 10, 1972, acknowledging transfer of stock.

We wish to call the Court's attention to the fact that the Pechenik case was reconfirmed recently in *United States v. McCue*, 301 F.2d 452 (1972).

Copies of the motions will follow with other pertinent Data for Supplemental Appendix.

People Are Asking - Who is Sidney Eisenburg

Sydney M. Eisenbert was born in Milwaukee, Wisconsin, June 20, 1916. He attended the Milwaukee Public Schools and graduated from Milwaukee State Teachers College in 1937 with the degree of Bachelor of Education in the secondary education professional school. He worked his way through College, serving as a machinist, newspaper reporter and advertising representative.

He graduated with a law degree from Marquette University in 1939 and has been practicing law in Milwaukee ever since. He is an expert in the field of trial law and has developed a large labor practice, and is nationally known as a trial lawyer.

Eight lawyers constitute his personal legal staff. His offices are located in the entire building at 1131 West State Street, Milwaukee, Wisconsin. His wife is also an able trial lawyer and is associated with his firm.

He has tried cases in various parts of the country and has written opinions in the field of labor law for unions throughout the country.

He is labor counsel for the Retail Clerks Union, AFL-CIO and Building Service Employees Union, both local 150 and Local 500, AFL-CIO. He has served as special Counsel to the Paper Mill Workers Union at Kimberly Clark and Niagara. He has served nationally as Economic Research Counsel to the entire CUA which includes Unions at Timkin Ball Bearing, U.S. Steel, Standard Oil of Indiana in Louisiana, Higgins Shipyard, Zenith Radionic Union and other key nationally known factories.

He is labor counsel for the Die Sinkers Union representing employees at various plants such as Ladish Drop Forge and other large Wisconsin firms who employ Die Sinkers members of the union.

He is counsel for the School Bus Employees Union, MAC Independent Union and various others.

He is General Counsel for the AFL-CIO Electricians Union at both Square D Plants in Milwaukee.

He is Counsel to the Dominican Republic and is consulted by the Longshoremen's Union in the Carribean Group and a prominent South American Country, as well as a major International religious group.

WSU Stevens Point Extension Classes Are

MILWAUKEE SENTINEL
LOCAL NEWS
Tuesday, Mar. 21, 1967
Page 5, Part 1

Judges Claim Busy Lawyers Slow Courts

By WILLIAM JANZ

A proposal will be made to set up a court system which would indicate whether certain attorneys have so many cases pending in civil court that it sometimes prohibits courts from operating effectively.

Some judges have said that the court calendar here is in excellent shape but that a few attorneys, one in particular, have so many cases pending in various courts that it is difficult to set a case for trial involving them.

Francis X. McCormack, clerk of courts, said he would recommend in a letter to the county board of judges that each attorney be assigned a number. McCormack's office could then tell how many cases every attorney has pending and where.

Circuit Judge William I. O'Neill said he would recommend to the county board of judges:

- That an attorney be permitted only one adjournment when a case is ready for trial.
- That the board establish a certain number of cases, possibly 50, as a maximum that an attorney could have pending here.

Atty. Sydney M. Eisenberg, one of the busiest trial attorneys, said, "This is ridiculous. The courts are succumbing to the wishes of the wealthy defense law firms, the insurance companies, that want to eliminate capable plaintiff law

"If the judges do their bidding, something may have to be decided in the elections. What business is it of anyone's how many cases I try? It's none of anyone's damn business."

When Eisenberg is trying a case in one court, sometimes several other courts will call the court that Eisenberg is in and ask that he report immediately after his case is finished. Some courts reportedly have set up five or more of Eisenberg's cases in a row and once he is in court, the judge doesn't let him go until the cases are finished.

However, one judge recently said that a client has the right to choose his own attorney, no matter how busy that attorney is. And he said that person also has the right to have his day in court even if he and the court have to wait a long time because the attorney is busy.

Law Firm Involved In 357 Civil Cases

By WILLIAM JANZ

The law firm of Eisenberg & Kletzke is involved in 357 civil cases that are pending in circuit and county courts here, a report showed Wednesday.

Sydney M. Eisenberg, who heads the small firm, has been [redacted] causing problems with [redacted] calendars because of the great number of cases he handles.

Eisenberg does almost all of the firm's civil court trial work and he is so busy that it is difficult to set a case for trial if he represents one of the litigants, some judges have said.

Eisenberg's firm was one of three that are each involved in more than 300 pending cases, but the other two firms are much larger than Eisenberg's.

According to a report of the office of Francis X. McCormack, clerk of courts, Kivett and Kasdorf, which has 15 attorneys in the firm, is represented in 366 cases, 327 of them as attorneys for the defendants. It is represented in more cases than any other firm.

Wickham, Borgelt, Skogstad and Powell, a firm with between [redacted] represents defendants in 297 cases and 38 plaintiffs for a total of 335.

Eisenberg has five attorneys in his firm but two of them are assigned to divorce and criminal work which was not considered in the report.

The firm represents plaintiffs in 325 cases, more than any firm in the county. The report also showed that the firm was not ready for trial in 263 of the 357 pending cases.

The report was requested by the calendar committee of [redacted] Judge William F. O'Neill suggested it.

At the time, O'Neill said he was concerned about one attorney slowing down the court system. He said then that he would recommend that attorneys be permitted only one adjournment when a case was ready for trial.

O'Neill [redacted] said he would suggest [redacted] the county board of judges establish a certain number of cases, possibly 50, [redacted] attorney could have pending.

However, other judges, who admit there is a problem, have said they don't [redacted] much [redacted] situation.

One judge said, "You can't tell anyone they can't go to Eisenberg."

Asked whether he thought [redacted] "Absolutely not. This is ridiculous."

The report showed that 11 firms are involved in more than 100 cases each that are pending, most of them as representatives of the defendants. Eisenberg's is the only firm to have more than 110 cases pending as attorneys for the plaintiffs.

The report showed that the 11 firms which represent about 1% of the total number of firms are involved in more than 22% of the cases.

The cases include no probate, divorce or criminal cases.

— 574 —

— 575 —

— 577 —

— 576 —

No. 77-1063

In the Supreme Court of the United States

OCTOBER TERM, 1977

SIDNEY M. EISENBERG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1063

SIDNEY M. EISENBERG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner seeks review of his conviction for filing false income tax returns on the ground that there was no evidence of willfulness, that he was subject to selective prosecution, and that one of the counts was barred by the statute of limitations.

After a non-jury trial in the United States District Court for the Eastern District of Wisconsin, petitioner was found guilty of filing false income tax returns for the years 1968-1970, in violation of 26 U.S.C. 7206(1). The district court imposed no prison sentence; it fined petitioner a total of $7,000 with respect to the three counts (Tr. 1146, 1163).[1] The court of appeals affirmed (Pet. App. 501-505).

---

[1]"Tr." refers to the trial transcript. "Op." citations refer to the trial court's opinion of December 10, 1976, denying petitioner's post-trial motions.

It was undisputed that the petitioner had signed his individual income tax returns for the years in question and that the returns had omitted substantial amounts of "adjusted gross income."[2] The district court found that petitioner's returns greatly overstated certain deductions (Tr. 1141-1144) and omitted substantial capital gains from 1968 and 1969 as the result of manipulations of corporate stock transactions (Tr. 1140-1141, 1143). The court also found that petitioner had paid some of his ductible expenses with backdated checks and claimed the deductions in advance of the year of payment[3] (Op. 10, 13), and had improperly deducted interest on two loans prior to the taxable year in which the loans were established (Tr. 1142). The trial court found that the evidence established that petitioner exercised extensive control over his financial transactions (Tr. 1142-1143) and thereby refuted petitioner's claim that his bookkeepers and accountants were responsible for the false returns. Accordingly, the trial court concluded that petitioner's understatements of income "* * * had too strong a relationship to the tax computation period and computation of taxes themselves" (Pet. App. 503; Tr. 1140) to have been isolated mistakes.

1. Petitioner contends (Pet. 69-103, 116-145) that the evidence was insufficient to establish that he acted willfully. But the court of appeals (see Pet. App. 503) correctly viewed the evidence in the light most favorable to the government and concluded that the evidence and the reasonable inferences therefrom supported the verdict.

---

[2]The government's computations showed total unreported adjusted gross income of $66,605.63 in 1968, $15,075.84 in 1969 and $75,808.11 in 1970 (Tr. 991).

[3]The trial court found that petitioner's improperly accelerated deductions were used to reduce large capital gains in 1970 (Tr. 1144).

Glasser v. *United States*, 315 U.S. 60, 80. Contrary to petitioner's assertion (Pet. 86), willfulness may be inferred from the circumstances of the case. See, *e.g.*, *United States* v. *DiVarco*, 484 F. 2d 670, 674 (C.A. 7), certiorari denied, 415 U.S. 916; *United States* v. *Ramsdell*, 450 F. 2d 130, 134 (C.A. 10); *United States* v. *Spinelli*, 443 F. 2d 2, 3 (C.A. 9). Here, the trial court properly considered evidence which established a consistent three-year pattern of substantial underreporting of adjusted gross income (*Holland* v. *United States*, 348 U.S. 121, 139) and manipulative conduct by petitioner, such as the backdating of checks[4] (see *Spies* v. *United States*, 317 U.S. 492, 499). Moreover, the trial court properly considered his intent in light of his background as an attorney and a man of admittedly extensive business experience. See *United States* v. *Coblentz*, 453 F. 2d 503, 505 (C.A. 2), certiorari denied, 406 U.S. 917; *United States* v. *Ostendorff*, 371 F. 2d 729, 731 (C.A. 4), certiorari denied, 386 U.S. 982. Viewing the "whole picture" (Tr. 1144) of the evidence, the trial court could reasonably conclude that although petitioner did not prepare the returns which he had signed and filed "* * * he "knew that he should have reported more income than he did." *Sansone* v. *United States*, 380 U.S. 343, 353.

2. Petitioner further argues (Pet. 8-37, 59-69) that he was the victim of selective prosecution. Although he asserts that the government, the trial court, the newspapers in Milwaukee, Wisconsin, and an alleged "unknown power" (Pet. 15) had entered a conspiracy to "get" him, petitioner failed to produce any evidence to

---

[4]Petitioner attributes many of the errors in his returns to the hybrid method of accounting he used. But the trial court found that the system was not uniformly used or applied and was in fact misused by the petitioner for tax computation purposes (Tr. 1139-1140; Op. 10).

support his contention. Accordingly, the court of appeals correctly held (Pet. App. 504-505) that petitioner had failed to demonstrate that others similarly situated had not been prosecuted for the same crimes and that the government had employed an impermissible standard in deciding to prosecute him. See, *e.g.*, *United States* v. *Kelly*, 556 F. 2d 257, 264 (C.A. 5); *United States* v. *Bourque*, 541 F. 2d 290, 292-293 (C.A. 1); *United States* v. *Scott*, 521 F. 2d 1188, 1195 (C.A. 9), certiorari denied, 424 U.S. 955; *United States* v. *Peskin*, 527 F. 2d 71, 86 (C.A. 7), certiorari denied, 429 U.S. 818.

3. Finally, petitioner argues (Pet. 103-106) that the charge for 1968 was barred by the statute of limitations. Petitioner was originally indicted on April 9, 1975, prior to the expiration of the six-year statute of limitations (26 U.S.C. 6531(5)) for Count I of the indictment. That indictment charged petitioner with falsely reporting "gross income" on his returns. At the request of the government, the trial court dismissed the indictment as "technically defective" on August 22, 1975. The present substituted indictment was returned on September 5, 1975, charging the same violations for the same years, but substituting the term "adjusted gross income" in all counts where the phrase "gross income" had appeared in the original indictment. Thus, the court of appeals correctly held (Pet. App. 503-504) that under the saving provision of 18 U.S.C. 3288, Count I was not barred by the statute of limitations, because petitioner was reindicted within six months of dismissal of the original timely indictment. See, *e.g.*, *United States* v. *Charnay*, 537 F. 2d 341, 354-355 (C.A. 9), certiorari denied, 429 U.S. 1000; *Mende* v. *United States*, 282 F. 2d 881, 883-884 (C.A. 9).

Petitioner contends, however, that Section 3288 does not extend the statute of limitations in this case, because the original indictment was not "legally insufficient" (Pet. 58). But his contention ignores the plain language of 18 U.S.C. 3288, which extends the statute of limitations when an indictment is found "* * * defective or insufficient for any cause."

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

MARCH 1978.

No. 77-1063

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

SYDNEY M. EISENBERG,

Petitioner,

— vs —

UNITED STATES OF AMERICA,

Respondent.

REPLY TO MEMORANDUM FOR THE UNITED STATES

SYDNEY M. EISENBERG
Petitioner

POST OFFICE ADDRESS:

1131 West State Street
Milwaukee, Wisconsin 53233
Telephone (414) 271-0931

FINEST LEGAL BRIEFS CO., MILWAUKEE, WISCONSIN 53203

INDEX TO BRIEF

AUTHORITIES CITED

No. 77-1063

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

SYDNEY M. EISENBERG

Petitioner

-vs-

UNITED STATES OF AMERICA

Respondent

REPLY TO MEMORANDUM FOR THE UNITED STATES

RESPONSE TO MEMORANDUM

On March 31, 1978, the Solicitor General's office filed a memorandum, without permission and in complete violation of the specific Supreme Court order dated March 15, 1978, which provided that the Memorandum filed by the Solicitor General should be filed only up to and including March 29, 1978. For this reason and many other good reasons, such Reply should be stricken. For order of Extension, please see Appendix.

It was never agreed that the returns omitted substantial amounts of adjusted gross income. This is simply untrue. The Government's statement that "it was undisputed that the Petitioner

had signed his individual income tax returns for the years in question and that the returns had omitted substantial amounts of 'adjusted gross income'" is sheer sophistry and incorrect.

Counsel for the Petitioner, a man who considered himself an authority in the field of taxation, one Attorney George Crowley, of Chicago, maintains he did not bother to offer any affirmative testimony in defense of the case, because of the fact that the Government itself conceded that every penny of income was in the records available to the Certified Public Accountant who drew the income tax returns. Nothing is due I.R.S. Any mistakes in bookkeeping made by the Certified Public Accountant or the bookkeeper were amply explained and thoroughly explained by the witnesses, all of whom were called as Government witnesses. Mistakes were made both ways, both for the Petitioner and against Petitioner, so that they balance each other out.

No manipulation of corporate stock transactions were established for the simple reason that there were none. The trial court obviously did not understand that a "wash" sale was neither a manipulation nor illegal. The sale of the stock one day and the purchase of it the same day or later may be "collapsed" by the Government and taxed. But by no means is it "criminal" and the Certified Public Accountant involved testified it was his suggestion that a "wash" sale be made if Petitioner "liked" the stock; nothing was hidden and Petitioner simply relied upon the accountant's opinion that the stock could be sold by an individual, purchased by a corporation, without the "roof falling in" or the Internal Revenue Service, through the Assistant United

States District Attorney, misleading the Judge into believing that Petitioner did not have a right to reply on his Certified Public Accountant. Such Certified Public Accountant clearly and effectively stated that he saw nothing wrong whatsoever with the transaction, had suggested it, and still saw nothing wrong with the transaction. Petitioner relied on his Certified Public Accountant's advice. Petitioner knew nothing whatsoever about taxation, bookkeeping or the field of accounting. Levine's advice is in transcript.

The reference made to backdated checks, claiming that deductions were made in advance of the year of payment clearly referred to the fact that the Certified Public Accountant had been using for ever thirty-five years a system wherein a check was to be drawn for the date the debt was construed, within said annual period it was incurred and billed, namely between January 1st and December 31st of that year. He testified these checks were sent out as soon as money became available, which in some cases could have been after the first of the year. The important point is that the bill was incurred and the check made out for the year when the work was done or the debt incurred.

A perfect example of how the Solicitor General, the Trial Court and the Court of Appeals missed the point entirely and wrongfully convicted Petitioner is clearly delineated in the case herein. In the Appendix is a copy of a letter dated March 20, 1969 from Pauline Leonard, Assistant Cashier of the Ashland State Bank in Chicago, Illinois. The letter dated March 20, 1969 states as follows:

"We received your renewal note for $60,000.00 with your check enclosed for $195.00. Due to a typographical error, we mistakenly asked for $195.00.

The notice for interest due should have been $1950.00. Please submit a check for $1750.00, representing the difference so we may process your new note."

This letter obviously went to a bookkeeper at the Eisenberg office who issued another new check for December 31, 1969 in the sum of $1750.00. Should the bookkeeper have dated the check March 21, 1969 instead of the proper date, December 31, 1969, which was again an interpretation by the Eisenberg bookkeeper since she meant December 31, 1968 and obviously not December 31, 1969? She wrote the date 1969 on the check because she received the letter dated March 20, 1969. The check went through and was recorded by the bookkeeper as of December 31, 1968, so that the original check of $195.00 was added to the new check for $1750.00. Is this a reason for the I.R.S., the Court of Appeals, and the Milwaukee Journal to defame Petitioner? He never knew bank's mistake.

Counsel for the Government then claimed that Eisenberg reported he paid interest which was not even due in that year. Petitoner never knew what interest he owed. All he did was sign checks. Any intelligent child could understand what happened, but in this case it made no difference what had happened. It is easier to say that interest was paid when not due. Petitioner had a plot in mind. This is absurd, to say nothing of being unfair and unjust.

The First National Bank of Lincolnwood, for example, sent a blank note to Petitioner for signature, which note was promptly filled out and returned to and by the First National Bank of Lincolnwood to the Eisenberg office. The interest on the note was prepared and charged in the sum of $292,000.00; the sum of $20,723.88 instead of $10,333.55 was sent to the bank. An examination of the Notice of Interest Due from the bank shows that the bank made a mistake in the amount of interest due, x'd out the sum and reduced it to $10,333.55, although an examination of the note proves that behind the x's crossing out the amount of the note were other figures which look like $299,077.77 and the note further states that the note was due September 30, 1969, the note itself being in the sum of $292,000.00. The note further says that the interest due 3-31-69 was $10,333.55. It did not say the bank would wait for the interest payment. Why the Eisenberg bookkeeper paid the sum of $20,723.88 on December 31, 1968 can be answered simply and honestly.

Petitioner knew the bookkeeper. The check was not made out to a bank. There is no way the bookkeeper could have gained from the transaction. If she handed the check for signature to Petitioner, who was busy at the time talking to a client, listening to a telephone conversation with his left hand and signing a group of checks with his right hand, he would have no reason to mistrust anyone involving a check to a bank or banks.

The Certified Public Accountant had a duty to see if the check was made correctly because the books would have to be accurate by tax time. The Bank would certainly acknowledge overpayment

or under-payment. Keeping records in this situation, in the mind of the Petitioner, was a routine matter to be handled by computers, adding machines, and, if nothing else, by an "abacus" or someone paid to be an accountant and who could count on his toes, if nothing else. Certainly, since Petitioner owned and the bookkeepers used four or five NCR 332's and 333's, he had every right to rely on all these qualified people. He ran no machine.

It was the Internal Revenue Service who added two and two together and got seven. It was the Internal Revenue Service who apparently convinced the Trial Judge, the Court of Appeals and the Solicitor General's Office that Petitioner deliberately paid interest in advance, although he was not required to, when there is no way under the sun he could have known what his income tax would look like until the middle of the following year. The conclusions reached by the Trial Judge and the Solicitor General's Office in its Memorandum simply boggled the human mind. It is all the more reason why Petitioner retained two firms of Certified Public Accountants and why, when a Certified Public Account was asked in the trial why there were two firms who prepared the income tax returns rather than one, he said that he asked Mr. Eisenberg the same question and Mr. Eisenberg said "two heads are better than one." The trial Judge simply missed the point and the problems of a taxpayer.

As to the Certified Public Account's opinion of their own ability to keep accurate records and put the mind of the taxpayer at ease, we are enclosing in the Appendix an ad prominently displayed and paid for to the powerful Milwaukee Journal through its morning paper, the "Milwaukee

Sentinel" headed: "CPAs Controllers of the bottom line. ....They solve problems, analyzing alternative financing, evaluating production introduction, working to help maintain full employment. Business and industry reply upon CPAs. We all do. CPAs. They count in more ways than one. Wisconsin Institute of Certified Public Accountants." This ad is displayed in the Appendix, Milwaukee Sentinel, Monday, March 27, 1978.

It appears everyone had a right to rely upon his Certified Public Accountants except Petitioner. Of course, Petitioner only had two Certified Public Accountants making out his income tax returns. If this is the Solicitor General's theory of fair play, one can only conclude that the entire country is in big trouble.

What is there so difficult to understand that any layman would believe that his accountant was doing the proper thing when for the last twenty years Internal Revenue Service had been coming in, checking the books annually, and never complained about this "Hybrid" system. It was easy for the Government to tell the trial judge that such a system was more applicable to a smaller company or a smaller operation, but the truth of the matter is Petitioner never considered that he was a "big operator" nor that his partnership was a "big operation" or that his operations were "big" operations". Although there were many employees, many bookkeepers, tens of thousands of entries, the net earnings were not "big". Petitioner thought he was just an average American, who could rely on skilled people.

How the Government can misconstrue an advance payment of interest on loans which had to be renewed during a tight money marked period, is

again almost impossible to comprehend. Perhaps the Internal Revenue Service auditors were unaware of the difficulty of renewing loans for hundreds of thousands of dollars based on a note with stock collateral in a tight money market. When the bank calls for advance interest, that's it, or no loan. With all the bad publicity Petitioner was getting, it's a miracle he made the renewal loans at all.

The claim that Petitioner exercised "extensive control over his financial transactions" is false and misleading. Petitioner had nothing whatsoever to do with the bookkeeping, keeping of records and drawing of tax returns by the Certified Public Accountant firms who were absolutely qualified, had in some cases worked for the Internal Revenue Service fraud section, and who at all times were told to and relied upon to keep records honestly, correctly and properly. The fact that Internal Revenue Service photostated thousands of entries which, as Shakespeare would say "signified nothing," created an inference that all the papers, additions, subtractions and deductions in the case created smoke and therefore there must have been some fire, if inferences are permitted which lead to any kind of conclusion, in this case completely unwarranted.

The evidence simply does not meet any kind of test adequate to create three felonies. There was no motive proven or even inferred since gains and losses offset each other. Petitioner erroneously paid taxes on dividends from stocks he didn't own. There was nothing due and owing, but the fact that the Court couldn't find a motive is significant. None could be found because of the additional reason that the condition of the books was not established in the end of any cal-

endar year. There is nothing to infer because the Certified Public Accountants had established time frames which were followed carefully by the accountants and bookkeepers; they were in complete control of the records. To say otherwise is an absolute falsehood. Nothing was withheld from the I.R.S. Everyone dropped all other work to answer innumerable questions.

There is no question either with respect to the charge of 1968 being barred by the Statute of Limitations. An indictment was understandable and was complete on the basis of a failure to report gross earnings. This means in plain language that some income was not reported. Changing the charge to net income clearly means a charge altogether different, namely, that the problem was not with the gross income but altogether different since only the net income was involved and the claim was only to deductions. The Court had no right to convict Petitioner on transactions which occurred prior to 1968 when, as a matter of fact, even said prior transactions outside of the years of indictment were in no way, shape, form or manner illegal or wrong. Petitioner sought to keep the money belonging to the corporation reinvested for the corporations.

The money belonging to the corporations were invested in stocks at a higher than the 2% rate that had been received on Government bonds. This was done so that the corporate buildings need not raise rents, particularly when people living therein were on Social Security and had limited funds. The testimony is clear on this point, but the Trial Judge did not seem to understand it and the Solicitor General did not understand why the Petitioner would do this. The Certified Public Accountants explained it. What else can Petitioner

do?

The Trial Judge, a member of the Court of Appeals, improperly hearing the case without a written order from anyone, had his decision reviewed by his colleagues sitting in the Court of Appeals, and the Petitioner has had what should have been the best years of his life turned into the worst years of his life fighting to clear his name, culminating in a heart attack, a stroke and disgrace. If the Public can be convinced that Petitioner is a three time or even one time felon, not to be believed, then who will believe the truth about the death of Judge Krueger; Petitioner tried to save the life of a mentally ill judge who came to him for help. The powerful Milwaukee Journal, after the Judge issued a statement that he was appointing an honorary advisory committee to act as an ombudsman with the traffic court and treat everyone fairly with respect to color, religion and creed, then the Sentinel reporter ordered the Judge to leave his courtroom, go to the Sentinel editorial office immediately where he was admittedly caused to cry and pushed by the Editor into a chair. Within forty-eight hours a Milwaukee Journal reporter called the Judge, lied to the Judge and told him the District Attorney was going to investigate and remove him. The Judge, when asked for his comment, went into the bathroom, after taking the court bailiff's gun which was hanging in a holster, and killed himself. This was all made a matter of record only because Petitioner and his counsel courageously persisted in fighting charges of harassment of the Judge brought by the chairman of the Wisconsin Board of Bar Commissioners, and the Referee in that first suspension hearing cleared the Petitioner completely after hearing all the evidence. The Wis. Supreme

Court overruled the Referee and suspended Petitioner for 12 months and imposed a $20,000.00 fine. The twelve months suspension was stretched into twenty-one months.

In the instant case the Assistant District Attorney Bukey kept telling the Trial Judge Petitioner had been "disbarred". The Judge finally conceded a suspension was not a disbarment. But the powerful Milwaukee Journal continued to discredit Petitioner on every possible opportunity referring in story after story to the fact that the Petitioner had been disciplined by the Wisconsin Supreme Court because of "events leading to the death of Judge Krueger", in some stories reporting Petitioner had been disbarred. See apology in Supplemental Appendix.

The many newspaper stories in the Internal Revenue Service Intelligence file did not "fly" into the file. They were given to the Internal Revenue Service obviously by someone using the powerful Milwaukee Journal stories to get the Internal Revenue Service to do their "dirty work". Internal Revenue Service came through, as it did in other cases. Asst. Attorney Gen. Hyatt's recommendation for dismissal as stated to Attorney Gimbel was overruled. Why?

In his fight to clear his name against the powerful Milwaukee Journal, its subsidiary Milwaukee Sentinel, WTMJ, WTMJ-FM, WTMJ-TV, radio stations and television stations, Petitioner had to protest his righteousness against the elected Wisconsin Supreme Court Judges charges when everyone else was seeking the support and power, known and unknown, of the Milwaukee Journal, its lobbyists, its lawyers and its would-be allies. The Chief Justice of the Supreme Court, running

for election, was given many pages of favorable commentary in the Milwaukee Journal after the first suspension of Petitioner was ordered by the Wisconsin Supreme Court. He was re-elected, but is now deceased. Journal reporters have been known to brag about their power resulting from their daily visits with some judges to find out what had occurred in cases. Petitioner is not so naive as to believe that the Milwaukee Journal is not able to influence some members of the Judiciary and politicians.

There are some other TV and radio stations in the area. But since there are several TV stations and a number of radio stations, is the effect of the powerful Milwaukee Journal is somewhat diluted in any way?

The truth of the matter is that the programs of the TV and radio stations are published in the Milwaukee Journal at the whim and pleasure of the Milwaukee Journal. Does such a monopoly have an effect on the other minor "token" competition? The answer is obvious. What radio station or TV station would dare stand up to the power, both acclaimed and unknown, of the Milwaukee Journal. It takes courage indeed. Printed schedules needed.

The close co-ordination between the Milwaukee Journal and the United States District Attorney's office is clearly emphasized such as in the article, which is part of the appendix of this Reply, which shows the close co-ordination between Milwaukee Journal reporters, the United States District Attorney and Federal Grand Juries. Petitioner does not claim that any citizen, whether he be an ordinary individual or a newspaper reporter, cannot make a complaint. However, the effect of an ordinary citizen's complaint, as

against that of a newspaper reporter backed up by a monopolistic, agressive and mass media capable of a "cover up" in case anything goes wrong is so obvious that even an ordinary lawyer, as well as a suspended lawyer, who spent a lifetime trying to help keep justice operating is obvious.

It is difficult to fight a mass media with truth when there is no other medium with an equal effect so that the community can learn the complete truth. Lawyers who speak out to promote the ends of justice can be squelched like a candle in the night by a raging storm. How can a case be heard by an impartial jury when the press has conducted years of scurrilous untruthful attacks suggesting Petitioner had caused the death of a Judge? Can the powerful press not only sweep their sins under a rug but also provide a "patsy" almost at the cost of his life?

Bailiff Steve Kuzmic, in Judge Krueger's Court, refer to pages 432, 433, 434 of the appendix, testified at the trial that Judge Krueger had lent him thousands of dollars. As to Reporter Janz, page 434 of the appendix, that Milwaukee Sentinel slipped up and printed: "...About two hours later I returned, I told him I had informed my city desk of what had occurred and it was very concerned about him. 'You can't print anything about what happened', the judge said, 'Bill, you're going to ruin me.' I said we were primarily concerned about his health and his ability to sit on the bench and rule impartially under these circumstances."

Petitioner, on December 22, 1977 was forced to sell two buildings because of a tremendous amount of debts he had incurred, to say nothing

of unfounded claims. The report in the Milwaukee Sentinel, dated December 22, 1977 reporting the sale of the buildings, in no way refers to the huge mortgage and debts due, but instead refers to the instant tax conviction and the Wisconsin Supreme Court's suspension of Petitioner's right to practice law because of the "three convictions" which in truth were three counts of the one indictment and conviction which is the subject of the instant appeal. Relevancy? No. Slander? Yes. There will never be an end to this tax persecution because of Petitioner's audacity in finding the truth for the death of Judge Krueger. Every influence and power of the Milwaukee Journal is utilized to defame Petitioner and cause people not to believe him. Even his obituary must have been carefully prepared in advance to complete his character assassination. Is this an American concept of justice?

The attorney for the Board of Bar Commissioners who successfully obtained a suspension of the Petitioner's license to practice law in Wisconsin, was the petitioner in the disciplinary proceeding rather than the Wisconsin Bar Association who is in the best position to know Petitioner for approximately 40 years, understand his beliefs and decency, honesty and fair play. The counsel for the Bar Commissioners, a group chosen under Sec. 256.28 of the Wisconsin Statutes by the Wisconsin Supreme Court, stated in his brief to the Wisconsin Supreme Court, which remark was printed in the Milwaukee Journal for everyone in Wisconsin to see, that Petitioner cannot be believed.

The United States Supreme Court is not subjected to the vagaries of elections under the American Constitution. Judges, whether elected

or appointed, need support of the public to reach the highest levels of our court system. On the other hand, they can be misled by sheer rhetoric sophistry and perhaps inability to see the entire picture. At any rate, justice simply must prevail in our world or everything is lost. Petitioner is not the first one to be slandered by the unlimited power of the Milwaukee Journal.

The editorial of the Milwaukee Journal found in the file of the Internal Revenue Intelligence refering to the Wisconsin Supreme Court suspending the license of Sydney M. Eisenberg and his son, Alan D. Eisenberg, to practice law for at least one year ends saying "The court did admirably what it had to do". Page 201 of the Appendix. These words are startling and audacious, inebriated by the exuberance of their own verbosity.

When the Milwaukee Journal said the court "did what it had to do", was the Journal simply warning the Judiciary that when the Journal is involved in the matter, Journal interests had to be respected? Was the editorial intended to thank the Supreme Court for taking the Journal "off the hook"?

The Wisconsin Supreme Court had before it the evidence adduced by the Referee in the transcript which proved how the Milwaukee Journal reporter had telephoned the Judge, lied to him about his removal and when asked why he did this to the Judge, stated that he was leaving town and leaving the Journal within two weeks after said Journal reporter testified. The Wisconsin Supreme Court knew that the Eisenbergs had devoted thousands of hours, to say nothing of the money given to the attorneys who represented both Eisenbergs and were paid a huge amount, although

balance was in dispute, his representation and bills were made the subject of the two counts of the three indictments herein. Petitioner can only ask: "Is there no balm in Gilead"?

In the case of United States v. Bishop, 412 US. 346, (1973), defendant was charged with violation of Sec. 7206(1) and upon conviction appealed to the United States Court of Appeals for the Ninth Circuit. See United States v. Bishop, 455 F.2d 612 (9th Cir. 1972).

In the United States Supreme Court, Mr. Justice Blackman held that Sec. 7207 was not a lesser-included offense within Sec. 7206(1), and he remanded the case to the Court of Appeals for consideration of the other errors urged by the defendant. Justice Blackman concluded that there are distinctions between Sec. 7206(1) (a felony) and Sec. 7207 (a misdemeanor), and he stated as follows:

> "In the felony, then, the taxpayer must verify the return or document in writing, and he is liable if he does not affirmatively believe that the material statements are true. For the misdemeanor, however, a document prepared by another could give rise to liability on the part of the taxpayer if he delivered or disclosed it to the Service; additional protection is given to the taxpayer in this situation because the document must be known by him to be fraudulent or to be false." 412 US at 358.

In its Federal Court memorandum, the government in the case recited the first of these sentences; however, it is clear from the second sentence of the opinion of Justice Blackman that when it is not proven that the defendant prepared the false return, the appropriate charge is the Sec. 7207 misdemeanor.

The government has asserted that the statute should not be read in a way "so as to make liability turn upon fortuitous factual differences." Petitioner respectfully asserts that the differences between one who makes and subscribes a return and one who does not make but only subscribed a return is hardly fortuitous. It is instead a distinction founded upon the terms of the statutes themselves: one who prepares and signs a tax return which he knows to be false may be prosecuted for a felony; one who merely files or places in the possession of a government agency a false return should be subject only to the misdemeanor. This is one distinction which alone requires a judgment of acquittal of the instant charges.

Reproduced in the Appendix is a report by Edward R. Schwalbach, a special agent of Internal Revenue Service Intelligence, which took place October 14, 1971. This report by Agent Schwalbach proves in his conversation with former Agent Rakita, who in the instant case was representing Petitioner, on Page 3 of the report or page 385 of the Supplementary Appendix, that the Internal Revenue Service Intelligence was on a "simple fishing expedition": ".....Rakita objected to the granting of this extension. He stated that Kelly had been working on the returns for over a year and he did not believe additional time was necessary. He stated that

during all the years he had worked with the Internal Revenue Service he never spent that much time making an audit. He thought the explained issues were merely technical and asked Kelly if Eisenberg's books and records were in agreement with the returns. Kelly responded that he did find that the books and records were substantially in agreement with the returns filed."

"I then explained that I had considerable annual leave to take prior to the end of the year, that I was currently working on other investigations and that it would be some time before I could start working on this investigation. I also explained that in addition to the so-called technical adjustments that I was not satisfied that Mr. Eisenberg's returns reflected all of his income."

"Rakita then asked if we had any specific evidence that Eisenberg was not reporting any of his law receipts. I told him that we had no such evidence, however it was my job to determine the correctness of any returns assigned to me for investigation. He then said that I was merely 'fishing' and that they would not stand for this type of investigation especially in view of the amount of time that Kelly had spent checking the records. I told him that I did not agree with him, however if he believed that I was not properly conducting the investigation he could contact the office and complain."

"They finally agreed to extend the Statute of Limitations for each of the years 1966, 1967 and 1968 to June 30, 1972. These forms were left with Levine who was asked to return them after they had been signed."

The corporations involved were wholly owned by Petitioner. The Nankin Certified Public Accounting firm, when subpoenaed by the Internal Revenue Service, had the minutes in the file proving that Petitioner was authorized to purchase the stocks in his own name for the corporations. This was done. The Judge overlooked the fact that the minutes provided the President and sole owner of the corporation was to sell assets and replace it with stock. Nowhere did it say the exact dollars were to be used. This would be impossible to do. Since the minutes were never disproved, for the simple reason that they were properly drawn, entered and put in the corporation books, Mr. Schwalbach's report of the meeting of November 11, 1971, reported on pages 389 and 390 of the Appendix, amply explains it and apparently satisfactorily did explain exactly how the matters were handled and proved that Petitioner had nothing to do with the keeping of records or the returns themselves. The minutes were admittedly prepared at CPA Gillman's suggestion.

"At the start of the meeting Rakita introduced me to Ed Gilman, and explained that he was the C.P.A. who prepared the corporation returns of Shoreland Manor & Prospect Heights for Eisenberg.

"Rakita then explained that he wished to be sure that he understood the office procedures for keeping the records and who was responsible for the preparation of tax returns. He stated that all the records of income and expense for the legal practice and rental were kept by Eisenberg's employees in his office. They also handle Eisenberg's records relating to purchases and sales of stock and the receipt of dividends, from

those stocks. The office help also record rental and other income and pay expenses of the corporations owned by Eisenberg. Rakita stressed the points that Eisenberg was a busy attorney and also since the Krueger affair demanded so much of his time during the past several years. Eisenberg did not have the time to work on any of his records and did not even have time to determine if his employees were doing a proper job. Rakita stated that Eisenberg was then forced to rely on his employees. He also stated that Levine prepared Eisenberg's personal returns and that Gilman prepared the corporate returns.

"He stated that when it came time to prepare the returns both Levine and Gilman would contact the employees in Eisenberg's office who furnished them the necessary information and records that were required to prepare the returns.

"Both Levine and Gilman agreed with Rakita's statements as did Eisenberg. Levine and Gilman stated however that after they received the information to prepare the returns they would have to prepare the journal entries to close the books. After the returns were prepared they would be given to Eisenberg for signing and mailing.

"Rakita then explained the circumstances that caused the failure to report a portion of the profit from the sale of the Gisholt stock belonged to the two corporations. Shoreland Manor and Prospect Manor.

"After finding this out Levine had to make out a new return for Eisenberg omitting the Gisholt stock sale.

"He then in May 1968 wrote a letter to Gilman in which he related a conversation that took place in late March between Gilman and himself.

This letter states as follows:

'According to Mr. Eisenberg, the shares of Gisholt Corp. which were purchased in 1965 and 1966, were purchased with funds from the two above companies, (Prospect Heights Co. and Shoreland Manor Co.) but the broker erroneously put the shares in his name. If this is the case, then the profit on the sale of the stock should be reported by Prospect Heights and Shoreland Manor.'

Attached to the letter was a schedule showing the purchases and sales of the Gisholt Corp. stock.

"Levine agreed that this is what happened. Gillman stated that he received the letter and that he did report part of the sale of Gisholt stock on the corporate return of Shoreland Manor Company for the fiscal year ending 2/28/68. Gillman said that the balance of the profit from the sale of the Gisholt Stock was not reported on the 1967 Prospect Heights Company return in spite of the fact that this return was filed about a month after he received Levine's letter relative to the stock sale. He said that he checked his work records for May and June 1968 and found that he had not worked on the Prospect Heights return during that period. He accordingly concluded that he had already prepared the return prior to receiving Levine's letter and somehow overlooked changing the return to include the Gisholt transactions.

"I then asked Gillman if this stock belonged to Shoreland & Prospect if it was carried as an asset on the company balance sheets. He said that at one time he thought it was on the balance sheets but then found out it was not on the company books as an asset...." (Schwalbach.)

On a taped conversation, a copy of which was presented to the United States Attorney before trial, Internal Revenue Service Intelligence Agent Schwalbach stated that if nothing else was involved, perhaps he should not have been on the case at all.

There are pages in the Appendix proving the various overpayment of taxes, so that for the most part the Internal Revenue Service was repeatedly overpaid and had to return funds to Petitioner. Considering the volume, the different types of transactions, the many bookkeepers and accountants, as well as their help who are involved, the books and records must be considered excellent compared to the average business which did not hire as many experts or specialized help.

The Supplemental Appendix attached to this Reply includes "cutouts" from the Milwaukee Journal dated February 22, 1978 which emphasizes the working connection between the Milwaukee Journal staff and the former United States District Attorney's Office in Milwaukee, whose new replacement was sworn in within the last few days. In the story of 3 WHO SOLD 'GOLDEN LAND' IN TEXAS INDICTED FOR FRAUD, for example, it is interesting that the Journal articles make it appear that the United States District Attorney's office is working hand and glove with the Milwaukee Journal. Here was not only the monopolistic newspaper media in Milwaukee, but apparently the largest property owner, virtually the largest

source of news, the quintessence of conscience for Milwaukee and the power with the right to sit in on trials. It could discuss cases with at least some of the Judiciary, remove a Judge from his bench to the office of the Editor of the newspaper during his working hours, watch him cry, tell him an untruth, see him die, somehow find its newspaper stories in the hands of Internal Revenue Service Intelligence, which for some reason cannot find any data pertaining to the newspaper clippings or how they got in the file. It could squelch the story of the Judge's death with respect to the relationship between the reporter, the Editor and finally be lucky enough to find it was never mentioned in the suspensions in the Wisconsin Supreme Court opinions, repeatedly suggesting, however, in its stories that Petitioner caused the death of a Judge.

With Internal Revenue Service Intelligence seeing such stories before it, the result was Internal Revenue Service Intelligence went on a selective "fishing expedition", resulting in Petitioner, who had virtually nothing to do with his bookkeeping or accounting, to be found guilty of signing a false return, when he had not the slightest reason to expect the returns were wrong in any way, shape, form or manner. The power of the press has run amuck in this case.

It is difficult to believe that the Solicitor General himself, or anyone else, can find any justification for the wrong that was committed on the Petitioner. The attorney for the Wisconsin Bar Commissioners, who was former Chairman, was a former lobbyist for the Wisconsin Daily Newspaper League, unquestionably led by the largest newspaper, the Milwaukee Journal. Unless reversed, the Petitioner is guilty of three

felonies in the eyes of everyone and should not be believed at all. This statement is contained in the Wisconsin Supreme Court suspension brief, and is referred to in the attached Appendix. Petitioner asks the United States Supreme Court to clear Petitioner of these charges for felonies which are an insult to the intelligence.

SUMMARY

Petitioner is reproducing herein the entire Brief of Counsel for the Bar Commissioners in response to Motion for Rehearing. Speaking for the Wisconsin Board of Bar Commissioners, which was appointed by the Wisconsin Supreme Court his Brief is filled with the most scurrilious, calumnious sheer "hogwash" he could possibly include in what should have been a dignified presentation.

He threw caution and decency to the winds, because he knew he would be supported by the press. Even the Wisconsin Supreme Court had enough conscience to realize the lengthening of the twelve month suspension to twenty-one months was not a problem caused by Petitioner. They finally ordered him reinstated with the costs charged to the Wisconsin State Bar Association, whose large membership includes Wisconsin's largest law firm, which just happens to be counsel for the Milwaukee Journal and which was reported by the Milwaukee Journal last week to have obtained a court modification of its personal property tax involving rental of four floors at the First Wisconsin Bank Building, Wisconsin's largest bank, for $220,000 annually for each of four floors, and $1,600,000 worth of improvements.

The same law firm, then called Foley and Lardner, represented the Journal and its Sentinel throughout the many months of the hearings involving the Petitioner's first suspension before the Referee who cleared Petitioner although same was reversed by the Wisconsin Supreme Court for reasons which most lawyers never did nor now do understand. In the second suspension, the Journal printed Bichler's worst insults decrying Eisenberg's truthfulness.

A petition for certiorari to the United States Supreme Court on such suspension was denied.

But that suspension hearing followed the Tucker case explained in the instant case Petition. And in the Tucker case it was clearly proven by the Eisenberg lawyers that the police burned down to the ground the Tucker building containing a Mrs. Moses who was burned to death in the process.

The Journal overlooked the fact that a very much alive woman was burned to death by police shooting tear gas into the building to get out the black Mr. Tucker, who never intended to shoot any police officers at all. Plainclothes people were shooting at him so he shot back and was cleared of first degree murder in this community brought to a frenzy by the Milwaukee Journal, Milwaukee Sentinel, WTMJ-AM and WTMJ-FM, WTMJ-TV who were selling papers and viewers like crazy.

But let us not overlook the gratitude of the Milwaukee Police Department to the Journal for virtually ignoring the burning to death of the very much alive Mrs. Moses.

No wonder Petitioner and his family's lives were threatened, the safe in his office broken open; he was accused of bringing about a Judge's death, suspended from the law practice, his bookkeepers and accountants bombarded by IRS accountants and IRS Intelligence and he was selectively prosecuted. Anyone can see the Milwaukee police get free Sunday Journal papers at the Milwaukee Journal main building.

Attorney Robert H. Bichler, Attorney for the State Board of Bar Commissioners says "perjury type convictions violate the lawyer and render

him unfit to continue in the practice of law. If it is 'calumnious' to so argue, then we respectfully submit that what the bar needs is more such calumny."

Petitioner now submits that when the letter from the C.P.A. making out the tax return which was generally sent over an hour or two before the deadline for filing for signature on the many pages, any taxpayer is justified in accepting the word of his C.P.A. that the return is in order. When the books and records are complete and nothing is hidden or kept from the records by the taxpayer, he has no choice but to accept the judgment and word of his C.P.A.'s.

If U.S. Senators, Judges, governors, former IRS administrators all agree that an individual with complex business activities be expected to make out his own return, why should Petitioner be singled out and held responsible even if there were no errors or mistakes, which in this case were generally causing expenses to be overlooked and income charged to Petitioner which he didn't owe.

Were the reviewers of this case afraid to face the truth and clear Petitioner? Is the Solicitor General afraid of some unknown power? Petitioner hopes and prays that someone, somewhere will stand next to him, tall and unafraid to clear a victim of an American holocaust.

The reply to Attorney Bichler's brief entitled "Respondent's Reply to Petitioner's Brief" is also being printed herein, because Attorney Ray T. McCann is a former president of the Milwaukee Bar Association and also former president of the Wisconsin State Bar Association. His brief

was returned by the Wisconsin Supreme Court for the claimed reason that the Wisconsin Supreme Court rules do not permit a reply to a brief on a motion for reconsideration. But it was sent, it makes sense, it corrects erroneous statements by Attorney Bichler and it is reason enough for the reversal and dismissal of this case sought herein.

How in the world could Petitioner try cases in one court after the other and then do any bookkeeping, which he never had done? See article in Milwaukee Sentinel of March 21, 1967, which stated as follows:

JUDGES CLAIM BUSY LAWYERS SLOW COURTS
By William Janz

A proposal will be made to set up a court system which would indicate whether certain attorneys have so many cases pending in civil court that it sometimes prohibits courts from operating effectively.

Some judges have said that the court calendar here is in excellent shape but that a few attorneys, one in particular, have so many cases pending in various courts that it is difficult to set a case for trial involving them.

Francis X. McCormack, clerk of courts, said he would recommend in a letter to the county board of judges that each attorney be assigned a number. McCormack's office could then tell how many cases every attorney has pending and where.

Circuit Judge William I. O'Neill said he would recommend to the county board of judges:

* That an attorney be permitted only one adjournment when a case is ready for trial.

* That the board establish a certain number of cases, possibly 50, as a maximum that an attorney could have pending here.

Atty. Sydney M. Eisenberg, one of the busiest trial attorneys, said, "This is ridiculous. The courts are succumbing to the wishes of the wealthy defense law firms, the insurance companies, that want to eliminate capable plaintiff law firms.

"If the judges do their bidding, something may have to be decided in the elections. What business is it of anyone's how many cases I try? It's none of anyone's damn business."

When Eisenberg is trying a case in one court, sometimes several other courts will call the court that Eisenberg is in and ask that he report immediately after his case is finished. Some courts reportedly have set up five or more of Eisenberg's cases in a row and once he is in court, the judge doesn't let him go until the cases are finished.

However, one judge recently said that a client has the right to choose

his own attorney, no matter how busy that attorney is. And he said that person also has the right to have his day in court even if he and the court have to wait a long time because the attorney is busy."

In another issue of The Sentinel by the same reporter:

"The law firm of Eisenberg & Kletzke is involved in 367 civil cases that are pending in circuit and county courts here, a report showed Wednesday.

***

Eisenberg has five attorneys in his firm, but two of them are assigned to divorce and criminal work which was not considered in the report.

The firm represents plaintiffs in 325 cases, more than any firm in the county. The report also showed that the firm was not ready for trial in 263 of the 357 pending cases.

***

One judge said, "You can't tell anyone they can't go to Eisenberg."

***

Bichler's Brief:

STATE OF WISCONSIN

IN SUPREME COURT

No. 76-108-D

In The Matter Of The Disciplinary Proceedings Against

SYDNEY M. EISENBERG,
Attorney at Law.

BRIEF OF PETITIONER IN RESPONSE TO MOTION FOR REHEARING

ARGUMENT

The petitioner makes response to the brief of respondent on his motion for rehearing not because the brief appears to contain any merit, but because silence by petitioner might be construed by respondent as an acknowledgment that his brief has merit or such silence might be construed by respondent as acquiescence of petitioner to the charges made in the brief.

Since most of the matters raised in the brief have been ably answered in this court's original decision, petitioner in this reply will attempt to be brief without being unduly curt.

Attorney Eisenberg stands convicted (by proof beyond a reasonable doubt) of thrice wil-

fully and knowingly verifying by written declaration under penalty of perjury matters he believed not to be true and correct. It will not be harmful to the bench, bar or public if lawyers are "chilled" or rendered fearful from indulging in such conduct.

What is most frightful to the interest of the bench, bar and public is the almost paranoid persistent blindness of respondent to the wrongfulness of his conduct. Unless respondent recognizes his wrong (which he refuses to do), there can be no hope that he will right his ways. His rehabilitation is hopeless. To reinstate him at any time will be perilous to the bench, bar and public.

Respondent has not only blinded himself to the perjurous nature of his conduct, but he also now criticizes and contradicts this Court's decision in respondent's previous disciplinary case. Respondent has apparently also blinded himself to his misconduct presented there.

He attempts to lay at the feet of his bookkeepers and accountants the responsibility for his pattern of manipulation in his financial activities.

He is blind to the function of the lawyer who fails to see that perjury type convictions violate the lawyer and render him unfit to continue in the practice of law. If it is "calumnious" to so argue, then we respectfully submit that what the bar needs is more such calumny.

It is this court's responsibility (and it was not that of the federal court) to impose professional discipline on Mr. Eisenberg for his

perjurous actions.

The reasons Mr. Eisenberg after his previous suspension was not reinstated for a period of 21 months are not of record here. But if facts outside the record are going to be considered in this argument for rehearing, then it is only fair to point out that the delay was principally a problem caused by Mr. Eisenberg. For him to now call the delay vengeful treatment by the State Bar is for him to again distort facts.

In speaking of the legal profession, Justic Frankfurter has stated:

> "From a profession charged with such responsibilities, there must be exacted those qualities of truth-speaking, of a high sense of honor, of granite discretion, of the strictest observance of fiduciary responsibility, that has, throughout centuries been compendiously described as 'oral character'." Schware v. Board of Bar Examiners 353 US 232, 247, 1 Law. Ed. 2d 796, 7 S. Ct. 752.

Mr. Eisenberg does have his constitutional right to make his living. If he chooses, however, to make it within the legal profession, he must possess the quality of truth-speaking. His three felony convictions prove beyond reasonable doubt three instances of his lack of the quality of truth speaking.

If rehearing is merited on any issue, it is merited solely on the issues as to whether or not the six month suspension is adequate in view of

the respondent's either inability or persistent refusal to recognize professional misconduct.

Respectfully submitted,

ROBERT H. BICHLER

Attorney for Petitioner,
State Board of Bar
Commissioners

McCann's Brief, refused by the Wisconsin Supreme Court:

STATE OF WISCONSIN
IN SUPREME COURT

In the Matter of the Disciplinary Proceedings Against

SYDNEY M. EISENBERG No. 76-108-D

Attorney at Law.

RESPONDENT'S REPLY TO PETITIONER'S BRIEF

At the outset, it is to be noted that nothing in the Petitioner's Reply Brief disputes anything contained in the brief of Petitioner in support of motion for rehearing. Furthermore, adjectives, no matter how descriptive, cannot change facts. There were not three convictions; there were three counts in a single indictment.

The tax returns in question were prepared by certified public accountants and not personally by the taxpayer. On page 2 of Petitioner's Brief, in response to a motion for rehearing is found the following statement:

> If it is "calumnious" to so argue, then we respectfully submit that what the bar needs is more such calumny.

If this statement is sarcasm, we submit it has no appropriate place in this matter. If lawyers cannot rely on certified public accountants to prepare

tax returns, as Judge Morrison so aptly inferred, there indeed is a caveat to all attorneys that reliance upon accountants may result in criminal convictions.

The record in this case shows that, notwithstanding the numerous clients that Mr. Eisenberg had represented, none made any complaint about Lawyer/Client relationship.

As the Federal Court stated, it was not a "tax evasion" case. There was no money due and owing to the Government. There was no claim in the criminal action that the therein named defendant concealed any money due the Government nor that he altered any records. Any taxpayer under the same circumstances, if such taxpayer were a selected target for the I.R.S. as was Mr. Eisenberg, any member of the Bar could be suspended from practicing his profession.

More than two months of the suspension has already expired and we respectfully submit that the suspension should now be terminated forthwith.

Respectfully Submitted,

RAY T. McCANN
Attorney for Respondent.

CONCLUSION

The Solicitor General's office simply can't be serious when the statement is made that a man of extensive business experience necessarily knows or does anything about bookkeeping. The evidence herein did not disclose that Petitioner had anything whatsoever to do with bookkeeping. All he ever did in that area was sign checks.

Since the record is absolute on this point that Petitioner never did direct or even see any of the records involved, this should clear Petitioner completely. There is no evidence to the contrary and if there were any, it would be untrue, false, a baldfaced attempt to "frame" Petitioner. This is a serious misstatement of fact and is reprehensible, to say the least.

The conclusion that I.R.S. tax accountant Kelly assumed, when he told Petitioner that the president of General Motors can be held responsible for mistake of a company auditor refers to a civil liability. It is legally wrong to conclude, as the Trial Judge herein did that "viewing the whole picture, the trial court could reasonably conclude that although petitioner did not prepare the returns which he had signed and filed....he knew that he should have reported more income than he did."

Is this a responsibility of a taxpayer, looking at 10 to 30 pages each of a state and federal income tax return which contains totals of additions? Is he supposed to doubt the honesty or ability of C.P.A.'s hired to do this job correctly? Does I.R.S. require an attorney who deliberately stayed away from bookkeeping to be one whether he wants to or not? This is bondage,

slavery and mental torture, courtesy of the I.R.S., the new overseer of mental thinking processes, protected by the power of the U.S. Judicial and Administrative systems.

No one with a sense of fair play can submit to this type of conduct.

As to the Solicitor General's concern about the "unknown power" referred to by Petitioner, it is obvious that he is unaware of the facts in this case. Has anyone ever heard of "the power of the press"? Is it necessary to exhume a human body from the grave to know that Judge Krueger is dead? Whose misconduct occurred when the reporter called the judge, obtained a reaction to a lie and then started a "coverup" which resulted in the printed word assassinating the character of Petitioner? Is it too difficult to read the name "Milwaukee Journal" or its counterpart, also owned, the Milwaukee Sentinel or the newspaper clippings in the I.R.S. Intelligence which had nothing to do with taxes but caused I.R.S. "Intelligence" to contact Agent Kelly and mutually "go to work on Eisenberg"? Did anyone in this case outside of I.R.S. both to see what was in the clippings and determine why Petitioner was admittedly selected as a target for the I.R.S. The transcript proves the selection of Petitioner in black and white. Is the coverup by the powerful Milwaukee Journal of its own misconduct to be excused because of the power of the press? Their power should be limited when they act excessively or indecently just the same way that they condemn others.

There must be no such special privilege in the U.S.A. if this country is to remain free. The press, namely the Milwaukee Journal, not only

failed to tell the true facts but printed vicious repeated attacks on the Eisenbergs, selected for destruction. What a miscarriage of justice.

The I.R.S. Intelligence witness at the trial herein admitted Petitioner was one of three people selected by the I.R.S. Intelligence for prosecution. The details of the file were missing, so we can't repeat all the names. But the I.R.S. Intelligence witness in the trial admitted Petitioner was selected. The newspaper clippings were also in the file. What other proof is needed? When the I.R.S. Intelligence Agent contacted I.R.S. Agent Kelly to work with him on the case without telling Petitioner or "having him get wise" this is selectivity. This is persecution; there is no way Petitioner could have had a fair trial. The "bad" publicity, the "mumbo-jumbo" of the huge accumulation of the many thousands of records were twisted from nothing into sheer "horror" for the Petitioner. Is there no way to stop this terrible I.R.S. misuse of Petitioner?

Respectfully submitted,

SYDNEY M. EISENBERG,
Petitioner

POST OFFICE ADDRESS:
1131 West State Street
Milwaukee, Wisconsin 53233
Telephone: (414) 271-0931